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INTRODUCTION

TO

HISTORICAL JURISPRUDENCE

BY

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INTRODUCTION

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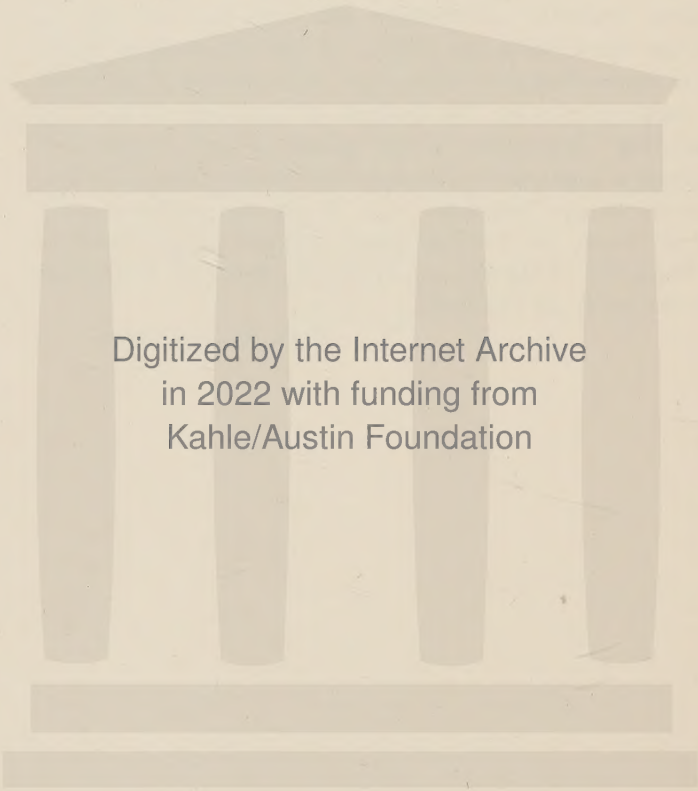
FOREWORD

The wish has been expressed by several teachers of law that the introduction to my Outlines of Historical Jurisprudence should be published separately in order to make it more accessible to students who have not the time to read the whole book, but might use the introductory chapters in connection with textbooks. This section of my work has been written for the purpose of assisting students in orientating themselves in the midst of the complicated problems of legal theory treated from various points of view. It seems to me, therefore, that it can be published as a separate book, and I should like to express my gratitude to the Delegates of the Oxford University Press for presenting it to the public in this form.

PAUL VINOGRADOFF.



PART I

LAW AND THE SCIENCES

CHAPTER I

LAW AND LOGIC

WHY should there be a special study of jurisprudence? Every one knows why there should be a study of law. It is obvious, for instance, that in order to draw up a will, or to enforce claims arising out of an agreement, one has to know the law. Some lawyers will say that they must attend to the actual rules of law and to the requirements of their clients and have no time to read books on general topics. But the craftsman's point of view can hardly be carried very far. Even in pleading as to the rescission of a contract you may have to rely on considerations of morality and of public utility.[1] It will, I suppose, be conceded that a wide range of culture and knowledge is desirable in the case of the legislator and of the judge; but then barristers and solicitors prepare the way for judicial decisions and deal with the same elements of right as the judges, although their arguments are presented from more one-sided points of view. Some practising lawyers will nevertheless—as Leslie Stephen has put it—consider all theory of law with "serene indifference"; if so, they will have to be left to their own devices. Jurisprudence addresses itself to those who study law as a part of a system of knowledge.

The lawyer's craft.

The subject has an interest of its own apart from any consideration as to immediate utility. Law is one of the great departments of human thought and of social activity. As such, it claims the attention not only of the jurist but of the student of social science, of the philosopher and, in a wider sense, of every educated man. We may systematize our knowledge of the world from two different points of view: either by reducing complex phenomena to their causes and ascertaining, as far as possible, the laws of their recurrence, or by using our knowledge as a guiding light for our

Theoretical and applied sciences.

[1] An interesting survey of the influence of ethical considerations on early Common Law and Equity is given in AMES' lecture on *Law and Morals, Lectures on Legal History* (Cambridge, Mass, 1913), pp. 435 ff.

actions. In the first direction, when we study things as they are, there arise theoretical sciences, such as mathematics, physics, economics. In the other direction, when we study the means of making things as we want them to be, we have to turn to applied sciences, such as engineering, medicine, law. Comparing laws with medicine, we may say that both aim at providing a rational background for a vast body of practical precepts; both are indispensable for the intelligent exercise of an art; both derive their teaching from the application of various sciences to the concrete problems of health and disease, of civil intercourse and crime. The physician combines for a specific purpose doctrines of physics and chemistry, of biology and psychology; the lawyer draws on the study of logic, of psychology and of social science in order to co-ordinate and explain legal rules and to assert rights. Our enumeration of the sciences on which the lawyer has to rely may seem scanty at first sight. Why is ethics not mentioned among them, why not history and philosophy? As to ethical doctrines, they are, of course, closely related to jurisprudence, but they present themselves to jurists chiefly in their practical aspect as influencing conduct.[1] In this sense the data of ethics form a most important chapter of psychology, as the operations of the mind bearing on conduct.

Of the connection between history and jurisprudence we shall have to speak on many occasions. It may be sufficient to state now that history cannot be contrasted with the theoretical study of law because it provides one of the essential elements of legal method. As for philosophy, its influence is all-pervading and is bound to make itself felt in the treatment of any subject: it forms, as it were, the atmosphere for all scientific studies. At the same time it cannot and ought not to direct the investigation of any particular point, for the very reason that it aims at a synthesis of all. Every jurist is left to face the problems of law in his own way, and by such help as he can derive from those branches of special knowledge which have a

[1] Cf. on the relation between morals and law, LORD HALDANE, *Higher Nationality*, an address delivered before the American Bar Association in Montreal in 1913, pp. 22 ff.

direct bearing on legal questions. And these are logic, psychology and social science.[1]

Fallacies and logical concepts.

Logic supplies the formal framework for all varieties of reasoning, and its relation to legal thought is obvious. The rules of reasoning are certainly not different in law from the rules recognized in the ordinary interchange of thoughts. In this sense the usual rules as to concepts and conclusions remain in full force as regards legal deductions. Indeed, juries attending to the arguments of parties have to be careful not to be misled by fallacies. Archbishop Whateley, for instance, has very appropriately illustrated the sophistical trick called *ignoratio elenchi* (irrelevant conclusion) from its frequent use by barristers.[2] This sophism consists in substituting for the proposition to be proved some other proposition irrelevant to the problem of proof. Another fallacy much favoured by sharp pleaders is the substitution of the absolute affirmation for a conditional one (*a dicto secundum quid ad dictum simpliciter*). In an amusing little book, published in 1588, a versifier of Spenser's circle, Abraham Fraunce, who happened also to be a barrister of Gray's Inn, treats of a "lawyer's logicke" on a pattern supplied by Pierre la Ramée's textbook of formal logic. He illustrates his teaching by alternate references to agricultural practices, or other occurrences of daily life, and to cases from the Year Books, the Abridgements, Dyer and Plowden. The passage concerning the *secundum quid* fallacy is worth quoting:[3] the legal illustration is taken from a trial in which the question arose whether the issue of a man was entitled to inherit property granted in special tail to a man and his wife and their issue. "A double elench (sophism) lurketh in this place, one of composition, another of division, for composition thus. Humfrey Crowther is a

[1] WUNDT, *Logik*, II, 2, p. 24.

[2] MILL, *Logic*, II, pp. 468, 469: "If any one has pointed out the extenuating circumstances in some particular case of offence, so as to show that it differs widely from the generality of the same class, the sophist, if he finds himself unable to disprove these circumstances, may do away with the force of them, by simply referring the action to that very class, which no one can deny that it belongs to, etc."

[3] *The Lawyer's Logicke*, p. 64.

good fiddler, therefore he is good. And this fallacy is from the whole, because those two things so joined together seem to make a whole, whereupon afterwards the part may be concluded, as though in this example Humfrey Crowther were a whole integral thing, made and consisting of these two parts, goodness and fiddlery. Some others call this *a dicto secundum quid ad dictum simpliciter*, when we apply that absolutely and generally which was spoken in part and in respect, as here Humfrey is called good, not generally, for his good conditions, but particularly in respect of his gitterne. In 9 *Henry VII* 19a, 'he who is heir to father and mother, is heir to the father, and yet to say that the issue of a husband from his second wife in the case of special tail is heir to father and mother generally and absolutely would not follow, because the father could have had a son by his first wife. *Vavisor, J.:* state the major premise, and the fallacy will be apparent: he, who is heir to father and mother joined is heir to father and mother each separately—and this is false.' ''[1]

Logical categories.

Of course, it is not only sophistical traps that may be studied in lawyer's pleadings, but also perfectly justified operations of reasoning. Fraunce, for instance, devotes some of his first chapters to discussing the relation between cause and effect, and classifies causes according to the best approved logical patterns of his time.[2] Under the heading ''efficient cause'' he refers to a curious case reported in Plowden's *Commentaries*, in which the widow of a man who had committed suicide contested the forfeiture of his estate on the ground that a dead man could not be charged with felony. The reply was that death was only an effect, while the cause of death consisted in the felonious act committed during lifetime. ''The cause efficient either maketh or destroyeth. Maister Plowden, folio 262a. They said that

[1] Issint in 9 *Henry VII*, 19a: "Cestuy qe est heire al pere et mere, est heyre al pere, mes l'issue del baron et sa seconde feme donees in speciall tayle est heyre al pere et mere, ergo il est heyre generalement al pere et mere et simpliciter, non sequitur, car le pere poet aver fils par le primer feme. *Vavisor* expone mayorem et apparebit fallacia. Cestuy qe est heyre al pere et mere conjunctim est heyre al pere diuisim, or ceo est false."

[2] *Lawyer's Logicke*, p. 12.

the forfeiture would be connected with the time of the original offence which caused death, and this is the putting him into water, and this was done in his lifetime, and this was a felony. . . . Thus Sir James Hales being alive caused the death of Sir James Hales, and the act of the live man effected the death of the dead man."[1]

Although every rule of logic may be illustrated from legal practice, on the other hand there is a considerable admixture of technical requirements which differentiates this mode of thought from other species of the same kind.

Rules of pleading.

As the conclusions of legal reasoning are directly translatable into practical results, and as they influence the status, rights, reputation and possibly the existence of persons, law is not satisfied with the general guarantees of good logic against fallacies and errors of judgment, but imposes rules devised to fit the average requirements of fairness and common sense, even at the risk of brushing away exceptional claims and imposing minor hardships. This modification of the logical framework is very noticeable in procedure. The history of Common Law procedure[2] presents special opportunities for watching the peculiar combination between rules of logic and the requirements of practical life as conceived and formulated by lawyers. The reason is that the legal profession did not strive in this country to construct a purely technical apparatus for conducting trials, but built up its administration of justice as a compromise between the professional element of the Bench on one side, and the popular element of the jury on the other. The first was supposed to deal exclusively with the *law* in the cases, while the latter was called up originally for a verdict as to the *facts* of the

[1] Issint que Sir James Hales esteant en vie causa Sir James Hales estre mort, et l'act del vive home fist le mort del mort home. Cf. PLOWDEN, *Comm.*, ed. of 1761, *Hales v. Petit*, Mich. 4/5 Eliz in C. B

[2] An excellent introduction to the special treatment of logical problems in Common Law is provided by THAYER, *A Preliminary Treatise on Evidence in Common Law* On the technical rules of reasoning in Equity, see LANGDELL, *Summary of Equity Pleading.* Cambridge, Mass., 1877.

trial. Without concerning ourselves with the rather intricate development of this fundamental opposition between law and fact, let us notice that the introduction of popular opinion, as a factor in deciding the trial, made it necessary for the judges to take special care that the moves of the opponents in the legal struggle should be reduced to their simplest and most regular expression. It was important in a contest before the Court that the parties should not be allowed to beat about the bush and to confuse the jury by irrelevant assertions and arguments. Historically the growth of Common Law procedure was chiefly directed towards keeping pleadings within reasonable bounds and conducting them along definite logical avenues. The Year Books show how the judges of the fourteenth and fifteenth centuries gradually developed the technical framework of pleading, a framework which in spite of a certain artificiality and rigidity proved an excellent school for conducting disputes in an orderly way. It stood the test of practice so well that it remained in force until the middle of the nineteenth century, and towards the end its principles found an admirable exponent in Sergeant Stephen. His textbook on pleading deserves attention even now, though a great part of the technical framework has been removed in deference to the unconventional habits of discussion in our democratic age.[1] The principal feature of this system was the joining of issue, the reduction of matters in dispute to a definite contradiction between assertion and denial, between *yes* and *no*. If A claimed the payment of a debt from B, the latter could *traverse* the plaintiff's declaration by denying that he owed the money. Or else B might demur and challenge a decision on the ground that the claim was based on a wagering transaction and void at law. A third possibility would arise in case the defendant *confessed* the fact alleged by the plaintiff, but *avoided* the claim arising out of it by pleading a valid *exception:* e.g., A brings an action against B for distraining a horse of his; B confesses the distress, but pleads that the

[1] On modern pleading as shaped by the Acts of 1834, 1852, 1873, etc., see ODGERS on *Pleading* (8th ed. 1918), pp. 155, 171, 175.

horse had broken into his close and was grazing there to his, the defendant's, damage.

It is obvious that the grouping of allegations within certain classes by *traverse, demurrer,* or *confession and avoidance* made it possible for the Courts to proceed with great regularity and logical accuracy. The detailed rules as to the application of demurrer, traverse and avoidance were in keeping with the main object of reducing the dispute to the simplest forms of logical contradiction. With this object in view the issue was allowed to be taken, according to strict rule, only on one single point, although in many cases there may have been several debatable points in the trial. Yet, in order not to confuse the mind of the jury by a multiplicity of issues, one of these points had to be selected by counsel for the defence for a special issue.[1]

The same principle of regularity in the struggle underlies such rules of pleading as that by demurring to a point of law a party admits the truth of an opponent's allegations as to fact,[2] or that in traversing an accusation the denial must be a denial of fact, and not a defence on the ground that an act was not wrongful,[3] or again, that two affirmations do not make a good issue.[4] This last rule looks rather cryptic at first sight. It is really a branch of another and wider rule prohibiting *argumentative* traverses, that is, traverses based on *inference* instead of direct denial. For instance, if it were alleged by the plaintiff in a trial that a party died seised in tail and the defendant traversed the declaration by alleging that he died seised in fee, this would not be good issue, because the denial would not be a direct one but based on the inference that he who held in fee did not hold in tail.

The Acts of 1852 and 1854 and the Judicature Acts of 1874 and 1876 have freed counsel from the shackles of a rigid system of pleading. This has made litigation

[1] *Coke upon Littleton*, 126a, note 4. As to the relation between general and special issues, see WILLISTON's preface to his edition of *Stephen on Pleading*, pp. 4 ff.

[2] *Stephen on Pleading* (2nd ed.), pp. 176 f.

[3] *Ibid.*, p. 180.

[4] *Ibid.*, pp. 423 f.

much more pliable and more dependent on intuition and imagination—with all their good and bad characteristics. On the whole, these changes make for an increase in substantial justice. But it must be admitted that they have lessened the hold of pure logic on the administration of the law, in as much as they have removed many of the firm pegs from which compelling deductions could be started.

Evidence.

A similar process may be observed in a domain closely connected with pleading, namely, in the law of evidence. As a result of the preliminary encounters in pleading the parties have sooner or later to fight for a decision on some issue of fact or law. In the first case everything would depend on the proofs which could be mustered in favour of the contending claims. Now, in order to realize the peculiar character of legal proofs one must keep in view two guiding considerations:

(1) The two litigants in a trial at Common Law do not hold a position of equality. The maxim—*beati possidentes*—has a wider scope than the protection of possession: it means also that the defendant in a trial can take advantage of the previous state of equilibrium and challenge the *actor* or plaintiff to overcome the inertia of existing order by irrefutable evidence.[1]

(2) In estimating the relative value of evidence, Courts cannot be guided by the methods and standards of criticism which obtain in daily experience or in historical investigation. They have, to be sure, certain privileges by way of examination and cross-examination which ordinary persons and historians are debarred from using. On the other hand, the practical consequences of their decisions

[1] THAYER, *Cases on Evidence*, 2nd ed., 1900, p. 69: "In general, he who seeks to move a court in his favour must satisfy the court of the truth and adequacy of his claim, both in point of fact and law. But he, in every case, who is the true *reus* or defendant, holds, of course, a very different place in the procedure. He simply awaits the action of his adversary, and it is enough if he repel him . . . It may be doubtful, indeed extremely doubtful, whether he is not legally in the wrong and his adversary legally in the right; indeed he may probably be in the wrong, and yet he may gain and his adversary lose, simply because the inertia of the court has not been overcome, because the *actor* has not carried his case beyond an equilibrium of proof, or beyond all reasonable doubt. Hence the importance of assigning the *burden of proof*."

are so important, that they must draw the line between the possible, the probable and the certain much more strictly than persons responsible merely to their own conscience, or guided by their own interest. As a matter of fact, the treatment of evidence by historians is quite different from its treatment by lawyers: writers like Gibbon and Macaulay were not hampered in their judgment by meticulous rules as to ascertained evidence.

On the other hand, the judge has to take care not only of the appropriateness of his decision as to the case in hand, but of its relation to former and future cases, of the soundness of the principle proclaimed and enforced in meeting the average requirements of fairness and public utility. Hence peculiar standards of admission and exclusion of evidence, devised to provide firm pegs for deductions in the responsible task of sifting evidence. This leads, among other things, to the rules as to *admission* and as to *relevancy*.

Burden of proof.

It is out of the question for us to plunge into a special discussion of all these interesting doctrines, but it is well worth while to point to some characteristic examples. As regards the *burden of proof*, the leading notion is quite simple and indisputable.[1] He who is allowed in the course of procedure to make an affirmation as to facts is called upon to prove it by sufficient evidence. This means that in the ordinary course of events, the burden of proof rests on the plaintiff (demandant or claimant).

However, in cases where a plea of confession and avoidance is put forward, it is the defendant who, granting the facts alleged by the plaintiff, seeks to put them in a different light, and therefore assumes the part of the *actor* and with it the burden of proof. Another apparent shifting of the burden of proof arises when the plaintiff can refer in support of his attack on the defendant's position to some general assumption of the law bearing on a whole class of facts, for example the assumption that a child born in wedlock is the legitimate issue of the husband or that a person making a will or a contract is presumed to be sane

[1] The expression may be taken in two different ways. See THAYER on *Evidence*.

unless the contrary can be proved. These are *presumptions* of the law intended to obviate wanton attacks on the reputation and welfare of families and individuals. Now, although the existence of such a *presumption* provides the plaintiff with a *prima facie* case and makes it incumbent on the defendant to produce evidence to the contrary, it cannot be said that the principle of the incidence of proof as regards claimants has been subverted. The use of the *presumption* is in itself an attempt to fall back on general admission instead of particular evidence, and, in case of substantial opposition on the defendant's side, the plaintiff will have to produce particular evidence if he does not wish to lose his case.

As an example of the importance of the proper treatment of the matter I should like to cite the case of *Hingeston v. Kelly.* "This was an action for work and labour. At the trial before Lord Denman, C.J., at Dorchester . . . it appeared that the plaintiff was an attorney, and . . . acted for the defendant as an election agent in a contest for the borough of Lyme Regis. . . . It also appeared from the evidence . . . that the plaintiff had voted for the defendant at the election, although a paid agent is not permitted by law to vote. The defendant produced evidence to show that it was agreed that the plaintiff's services were to be given gratuitously.

His lordship in summing up told the jury that the plaintiff, having proved the services rendered, was *prima facie* entitled to be paid, and that they should find for the plaintiff unless the defendant had distinctly proved to their satisfaction that the services were to be gratuitous, in which case they ought to find for the defendant. The jury found for the plaintiff.

A rule for a new trial was obtained.

In the Court of Exchequer, Parke, B., stated his opinion:

'The great difficulty in my mind is whether, looking to Lord Denman's summing up, the jury understood that the burthen of proof still lay on the plaintiff. The burthen of proof was never altered. The plaintiff being a professional man, and performing professional services, was

prima facie entitled to remuneration. His voting, indeed, was an act which amounted to a statement by himself that he was not to be paid. Still, if the case had rested there, the jury, notwithstanding the voting, might have believed that the contract was that the plaintiff was to be paid. Then came the evidence for the defendant to show that the plaintiff should not be paid. After this was given, the question for the jury still remained, whether on the whole evidence the plaintiff had made out his title to remuneration. I think, if I had been a juryman, that in the facts of this case I should have found my verdict against the party, whether the plaintiff or the defendant, on whom I was told by the judge that the burthen of proof lay.

Alderson, B. If the case was left in doubt, the plaintiff ought not to succeed.

Rolfe, B. . . . He (Lord Denman) appears to have said that the plaintiff has proved something which entitled him to a verdict, unless the defendant proves a discharge. I think the jury must have understood from this, that it lay on the defendant to make out his case. There must be a new trial.'[1]

Exclusion of Evidence.

As regards rules restricting the admission of evidence, their object is not merely to prevent the main threads of argument from being confused by the introduction of matters which have no direct bearing on the case: in this respect, although it is the duty of the judge to keep the course of the trial firmly in hand and to stop irrelevant digression, it would be impossible to formulate precise general rules. There are, however, certain classes of statements which are excluded on the strength of such general rules, because, though in particular instances they might be helpful in discovering the truth, on the average it is deemed to be dangerous and mischievous to admit the corresponding evidence. A well-known restriction of this kind consists in the exclusion of hearsay evidence, and the reason of it is not far to seek: if the Courts allowed such evidence to be produced, it

[1] 18 *L.J.* (Exch.), p. 360: THAYER, *Cases on Evidence*, p. 76 (Exch. 1849).

would be impossible to require a strict examination of the circumstances under which the original testimony had been obtained.

I should like to draw special attention to the exclusion of evidence as to former offences or accusations against persons on their trial. A characteristic case occurred in 1851.[1]

The defendant was indicted for felony, at the Leeds Borough Sessions, before the Recorder of Leeds. The first count charged the defendant with breaking into a warehouse and stealing on the 3rd of March, 1851, fifty yards of woollen cloth; the second count charged a simple larceny on the same day; the third count charged the defendant on the same day and year of having received the same property knowing it to have been stolen. The counsel for the prosecution proposed to prove that on the 13th of December, 1850, the defendant had been in possession of four other pieces of stolen cloth. The Recorder admitted the evidence and told the jury, on the summing up, not to apply the evidence to either of the first two counts; but he told them that it was evidence of guilty knowledge under the third count. The jury found the defendant not guilty on the first two counts; guilty on the third count. The defendant was sentenced to seven years transportation, but respited until the question as to whether the disputed evidence was receivable and whether the direction to the jury was correct had been decided. The Court held that the evidence ought not to have been received. In the course of the trial Lord Campbell, C.J., said: "The moral weight of such evidence in any individual case, would no doubt be very great; but the law is a system of general rules, and it does not admit such evidence because of the inconvenience which would result from it."

In delivering his decision Lord Campbell, C.J., said: "In my opinion there was no more ground for admitting the evidence under the third count than there was under the first and second. Under the two latter, it would have been

[1] *Reg. v. Oddy* (1851) 2 Den. G. C. 264.

evidence of the prisoner being a bad man, and likely to commit the offence there charged. But the English law does not permit the issue of a criminal trial to depend on this species of evidence. So under the third count, the evidence would only show the prisoner to be a bad man; it would not be direct evidence of the particular fact in issue. . . ."

Alderson, B. "I am also of the opinion that this evidence was inadmissible. To admit of such evidence in the present case would be to allow a prosecutor in order to make out that a prisoner had received property with a guilty knowledge, which had been stolen in March, to show that the prisoner had in the December previous stolen some other property from another place and belonging to other persons. In other words, we are asked to say that in order to show that the prisoner had committed one felony, the prosecutor may prove that he committed a totally different felony some time before. Such evidence cannot be admissible."

To sum up, the rules of Common Law procedure, although based on logic, disclose in their technical framing the preoccupation of the lawyers to fit their action to the requirements of average situations and prevailing social views, even though many solutions based on probability may have to be rejected in the process.

Interpretation.

The part played by dialectics in the elaboration and application of substantive law is not less conspicuous than its share in procedure. In fact, all the principal operations of juridical thought necessarily contain elements of logical analysis. When the problem has to be solved by reference to a legislative enactment—a statute, the clause of a code, a regulation or by-law—the correct solution generally depends on interpretation, that is, either on the definition of terms or on the co-ordination of various parts of the law in such a way that they are logically coherent. In the case of definition, a peculiar difficulty arises from the fact that legal rules are conservative in their essence, while the terms used by them are bound to be affected by gradual

changes in the meaning of words. Mill deals with these linguistic changes in a valuable chapter of his *Logic*.[1]

Interpretation based on context, and on ordination of various clauses and rules under leading points of view may be illustrated from *Attorney-General v. West Riding of Yorkshire, Ex parte Grenside*.[2] The case turned on the meaning to be attached to the obligation of local educational authorities under the Education Act of 1902 to "maintain and to keep up the school within its area in a state of efficiency." The West Riding County Council considered the words from the point of view of the twofold grouping of schools as national elementary schools on the one hand and as voluntary schools with a special board of managers under trust deeds on the other, and contended that it was bound to provide for the efficiency of both kinds of schools merely in those respects which were common to both, namely, for general secular instruction, while leaving all care and charges connected with denominational teaching to the denominational boards of managers. The House of Lords decided otherwise: by combining, among other things, clause 76 with clause 97, of the Act of 1902, they came to the conclusion that the maintenance of a school in a state of efficiency included provision for the teaching of religion. It cannot be asserted that the authoritative interpretation of the House of Lords in this case was purely the result of superior reasoning: the West Riding County Council was not guilty of a palpable logical blunder, and the Lords were certainly actuated by their general view as to the policy of the Act of 1902. But they were bound to bring this conception into harmony with the text itself, and this they achieved by co-ordinating the clauses round the conception of general efficiency.

In the application of Common Law rules the process of interpretation is more involved and requires greater skill on the part of the lawyer, because in many cases it is not only the application and interpretation of the rule that is

[1] MILL, *Logic*, II, p. 144; cf. VINOGRADOFF, *Common Sense in Law*, p. 125.

[2] (1907) *A.C.* 29 ff.

in question, but its very formulation. It would be out of the question to go into this matter in detail, as it forms the substance of a great part of the Common Law development. I should like, however, to point out as an illustration of the process the famous Rule in Shelley's Case, by which it was laid down that when the ancestor, by any gift or conveyance, takes the estate of freehold, and in the same gift or conveyance an estate is limited to his heirs in fee or in tail, the term *heirs* constitutes words of limitation of the estate of the ancestor, making it fee simple or fee tail, and not words of purchase giving a separate right to the heirs.[1]

Subsumption.

Even apart from interpretation every case before the courts may be considered from the point of view of the dialectical processes which underlie the arguments and the decisions. The most common method used is that of *subsumption*—the bringing of the facts of the case under the influence of some recognized rules. Take a recent case—*Macmillan and another v. London Joint Stock Bank Ltd.* (1917) 2 K.B. 439, and (1918) A.C. 777.

A clerk of a London publisher had taken advantage of the fact that he had been entrusted with a signed cheque in which the space for the words had been left blank, though the figures £2 had been written at the bottom: he inserted the words one hundred and twenty and the corresponding figures. The bank paid the money, but refused to assume responsibility for the payment of £118 in excess of the amount intended to be paid by the firm. "The governing principle had been stated by the plaintiff to be that a man could not take advantage of his own wrong . . . a man could not complain of the consequences of his own default against a person who had been misled by that default without any default of his own." It cannot be said that the decision in the case was easy to find. There were very strong grounds for the argument of the appellant, who tried to bring the facts under the operation of the rule that no

[1] COKE, I, p 233. LIEBER, *Legal and Political Hermeneutics* (Boston, 1839), contains many interesting observations on the methods of Interpretation in English Law. THIBAUT'S little book, *Theorie der logischen Auslegung des römischen Rechts* (Altona, 1799), is still the most thoughtful and clear treatment of the subject as regards Roman Law.

one could take advantage of his own wrong,—in this case the careless manner in which the employer had drawn up the cheque. The Court of Appeals, however, took another view of the rule to be applied: it drew a distinction between the proximate or effective cause of the loss and the more remote circumstances attending the issue of the cheque. In the opinion of the Court these circumstances did not suffice to shift the responsibility from the forger to the firm in whose employment he had been acting. "A customer owed a duty to his banker not to mislead, but such duty was not broken by negligently drawing a cheque in such a manner as afforded another person an opportunity of misleading. Negligence in order to estop must be negligence in the transaction itself, and the proximate cause of the loss." The chain of reasoning as stated by Swinfen Eady, L.J., is presented in plain literary language, but it might be converted by a pedantic schoolman into a *sorites*—a sequence of syllogisms in accordance with Aristotle's precepts. Such a sequence would ultimately rest on two fundamental syllogisms, a negative and a positive one. The first may perhaps be expressed in the following words: (1) No one can take advantage of his own wrong. (2) The incomplete manner in which the cheque was drawn up by the principal is not a wrong in the above sense. (3) This being so the principal is not responsible for the fraud of the clerk. The second syllogism may be stated as follows: (1) The risk in the acceptance of a fraudulent cheque falls on the bank which accepts it. (2) The cheque presented to the bank was a document which had been tampered with by the clerk. (3) Therefore the whole matter lies between the bank and the clerk.

The Court of Appeal pronounced in favour of the publishing firm. The House of Lords, however, looked at the matter in another way. The Lord Chancellor (Lord Finlay) in delivering his decision, brought the case under the operation of the rule as to negligence. He said among other things:

"As the customer and the banker were under a contractual relation in this matter, it appeared obvious that in

drawing a cheque the customer was bound to take usual and reasonable precautions to prevent forgery. Crime was, indeed, a serious matter, but every one knew that crime was not uncommon. If the cheque was drawn in such a way as to facilitate or almost to invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery was not a remote, but a very natural consequence of negligence of this kind. *Young v. Grote* was decided nearly one hundred years ago. It had often been approved of by many of the greatest judges, and, with the exception of a recent case in the Privy Council, there had never been a decision inconsistent with it but for that now under appeal.

The sole ground on which *Young v. Grote* was decided by the majority of the Court of Common Pleas was that Young was a customer of the bank owing to the bank the duty of drawing his cheque with reasonable care, that he had delegated the performance of that duty to his wife, that she had been guilty of gross negligence in having the cheque filled up in such manner as to facilitate an increase of the amount, and that the fraudulent alteration of the cheque by the clerk to whom, after it was filled up, it had been entrusted by her for the purpose of getting payment, would not have taken place but for the careless manner in which the cheque was drawn. The duty which the customer owed to the bank was to draw the cheques with reasonable care to prevent forgery, and if, owing to neglect of this duty, forgery took place, the customer was liable to the bank for the loss. As the negligence of the customer caused the loss, he must bear it.''[1]

Generalization.

While in cases similar to that we have been discussing the course of reasoning runs in the direction of subsumption to a certain rule, the logical process may also develop in the other direction; the problem would consist in such a case in combining scattered rules or decisions under more comprehensive principles. Legal reasoning on those lines

[1] In *Young v. Grote*, (1827) 4. Bing. 253, the wife of the plaintiff had ordered a clerk to insert the text of the cheque left in blank by her husband to the amount of £50. He wrote the text as directed,

leads to extensions of juridical concepts, or to their co-ordination. An example may be adduced from the history of the action of *assumpsit*. The Year Books of the fifteenth century show the Lancastrian lawyers at work on the doctrine of liability arising out of implied agreements. They were busy discussing the cases of a doctor harming a patient by mistaken treatment, of a smith spoiling a horse by shoeing it wrongly, etc., and they came to the conclusion that malfeasance in carrying out the undertaking amounted to a tort and entailed liability to compensation. But how about a carpenter who had promised to build a house and had failed to do so? The millmaker who having promised to construct a mill by an appointed day had not finished his work according to promise? The original view was that such cases of *nonfeasance* "sounded in covenant" and required a written contract to protect the parties. A case of 1425 shows the judges of the Common Bench divided in opinion on this point. (Y.B., 3 Henry VI, 36). Some ten years later, however, a more comprehensive view of the principle of *assumpsit* prevailed, as is shown in a decision by Paston and Jeune (Y.B., 14 Henry VI, 18, 58); liability for carrying out an undertaking was extended to cases of nonfeasance as well as malfeasance.[1]

Dogmatic construction.

The logical co-ordination of juridical ideas reaches a still higher level when the object is not to interpret, to apply or to formulate a rule, but to set up a doctrine, that is, a complex of mutually dependent rules. Such doctrines are apt to grow out of the settlement of particular problems, when practice or reflection induces lawyers to survey a whole section of their subject: the influence of such dogmatic constructions on the actual administration of justice can hardly be exaggerated, and the intellectual subtlety displayed in building up these logical schemes is often very remarkable. I should like to point out as an example the treatment of contractual obligation in modern systems of law. It will be convenient to start from the English

but subsequently made use of spaces left blank to alter the sum from £50 to £350

[1] W. Barbour, *History of Contract in Early Equity*, pp 45 ff., in Vinogradoff's *Oxford Studies in Social and Legal History*, Vol. IV (1914).

doctrine, as the more familiar one. The keystone of this doctrine consists in the requirement of a valuable consideration in cases of agreements not made by deed under seal.

"A valuable consideration in the sense of the law may consist in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other."[1] One of the principal consequences of this doctrine is that the "liberal intention" of one of the parties is not accepted as a sufficient ground for a valid promise. There must be an inducement to the promise in the shape of some valuable advantage, unless the transaction is carried out as a deed. The strict formulation of the doctrine was not achieved without misgivings. Lord Mansfield was in favour of admitting the validity of promises conditioned by moral obligations. But Common Law eventually settled down in requiring consideration in the present or in the future. "A promisor cannot be sued on his promise if he made it merely to satisfy a motive or wish, nor can he be sued on it by one who did not furnish the consideration on which the promise is based."[2] To be sure the greatest latitude is given to personal opinion in matters of consideration. As Hobbes has expressed it (*Leviathan*, pt. 1, c. 75): "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they may be contented to give."[3] Nevertheless the fundamental idea is the requirement in the case of "parol" agreements of some equivalent by way either of direct acquisition or of a limitation imposed on the other party. A distinction between consideration and motives is drawn in the English theory in the sense that no motives are recognized except those derived from material profit and loss.[4]

[1] *Currie v. Misa*, L. R. 10 Exch. 162. This definition is not quite complete in so far as it does not take note of the fundamental rule that consideration moves from the promisee. A more exact, but abstract definition is given by AMES, *Lectures on Legal History* (Cambridge, Mass., 1913), p. 323: "Any act or forbearance or promise by one person given in exchange for the promise of another."

[2] ANSON on Contract, p. 104 (14th ed., 1917).

[3] Cited by POLLOCK, *Principles of Contract*, p. 171.

[4] ANSON, *ibid.*, p. 102: "Past consideration is not consideration,

The test is simple and effective, but it cannot be said that it gets rid of difficulties: the weak side of the doctrine becomes apparent in the inadequate way in which it meets the cases when promises are given and obligations undertaken from motives of disinterested friendliness and affection. As "gratuitous liberality" does not find express recognition, its natural and unavoidable manifestations have to be disguised under fictitious pretences of consideration [1] or by treating agreements in the nature of a deposit or *mandatum* as exceptional and contriving some protection for them under rules derived from kindred doctrines.[2]

Continental systems have treated the same problem of agreement from the opposite point of view in so far as they have allowed a wider scope for motives. Historically and theoretically this treatment was suggested by certain features of Roman law. When the latter ceased to consider contracts in their purely formal aspect as relations established by the correct performance of certain solemn acts,[3] the means for ascertaining the will and intention of the parties naturally assumed a primary importance for the recognition and enforcement of agreements. Obligations which could not be referred to a *justa causa* were exposed to attack and revocation. In bilateral contracts, such as sale, the cause of the obligation of each party was easily discernible in the corresponding obligation of the other party: if you let a house, the rent promised to you in return is the cause of your obligation to the lessee. In agreements such as donation, gratuitous deposit or *mandatum,* the cause was recognized in the liberal intention of the promisor to benefit the promisee.[4]

and what the promisor gets in such a case is the satisfaction of motives of pride and gratitude."

[1] In *Thomas v. Thomas,* (1842) 2 Q. B. 851, the moral motive which prompted the husband in providing his widow with a home was not recognized, but the payment of a nominal rent was considered to be sufficient to uphold the validity of the agreement.

[2] Cf. Sir W. ANSON'S remarks on gratuitous bailment, *Contracts,* pp. 103 ff.

[3] One of these forms was "verbal" but not in the sense of the English *informal* "parol" agreement. The stipulation was considered a binding solemnity. Cf. GIRARD, *Manuel de droit romain,* 3rd ed., p. 452.

[4] See BRINZ, *Pandekten,* II, § 248, note 28; DERNBURG, *Pandekten,*

The doctrine was worked out definitely in French Law.[1] Art. 1131 of the Code Civil lays down that: An obligation devoid of cause, or provided with a false cause, or an illicit cause, has no effect whatever. (*Une obligation sans cause, ou sur une fausse cause, ou sur une cause illicite ne peut avoir aucun effet.*)

The development of the idea and its co-ordination with other rules of the Code gave rise to an interesting dogmatic construction. One of the consequences drawn from the requirement of a *causa* was the distinction between cause and motive. An attempt had to be made to draw a line of demarcation between the two.[2]

But the distinction, though plain enough in theory, proved to be difficult to apply in practice. If the Courts had rigidly followed the view that *cause* is the professed reason of a contract, they would have been obliged to lend the assistance of public power to transactions prompted by immoral motives if these motives, though sufficiently obvious, did not constitute a technical element of the contract. Cases in point arose, for instance, when Courts were asked to uphold donations made to concubines for the purpose of keeping up immoral intercourse. The Courts refused to do so on the ground of Art. 1131, but that meant that they found it necessary in the above-mentioned cases to overlook the distinction between cause and motive.[3]

Other difficulties arose from the necessity of harmonizing Art. 1131 with Art. 900. The latter rule lays down that if an illegal condition has been set to a promise, the promise remains valid while the condition is annulled. In applying Art. 900 the French Courts inquire whether the condition

§ 95, p. 220, 7th ed., II, § 315, applies to the modernized theory of Roman Law which tends towards the admission of "abstract" obligations apart from any *causa* WINDSCHEID, *Pandekten*, II, § 319

[1] It owes its origin there to the great seventeenth-century jurist Domat (*Lois Civiles*, Livre 1, t 1, s. 1, nn. 5, 6).

[2] The *cause* is the aim or the intention inherent in the contract and therefore known, or supposed to be known, by both parties The *motive* is the impulse that prompted the transaction. In unilateral contracts the cause consists either in a former service, or purely and simply in the liberal intention (BUFNOIR, *Cours de droit civil*, II, 528. Cf. COLIN et CAPITANT, *Cours de droit civil* (1915), II, 313.

[3] BEUDANT, *Cours de droit civil*, II, p. 115.

in question is so substantial as to form the *cause* of the contract or whether it can be treated as a *mode*, admitting of alteration. The decision in each case depends on a consideration of the circumstances of the case and must therefore be regarded as a point of fact.[1]

In this way the French doctrine tends more and more to pass from a conception of the cause as the professed reason of agreement to a view which makes cause equivalent to intention.

One might almost feel inclined to consider the complete abandonment of the requirement of a *cause* in the German Civil Code as the final result of the development of continental jurisprudence which, starting from the formal contracts of Roman Law and clinging for some time to the abstract notion of a juridical cause as distinguished from motive, has eventually reached a stage in which the Law deals directly with intentions and consent, and has abandoned the requirement of a technical cause.[2] On the whole it may be said that the English doctrine, insisting on a tangible justification of agreements, has been obliged to seek such a justification in valuable consideration, while the continental doctrines opposed to such a material test have been gradually led to reject altogether the technical requirement of cause. Thus under the influence of a logical deduction distinctions have been made and consequences have been drawn in all directions, but the predominance of the logical method has led to a one-sided treatment of principles and to conflicts with practical requirements which arise from the complications of actual life.

Exaggeration.

English law, so conspicuous for its common sense and attention to practical needs, is probably less liable than any other to have its rules perverted by an excess of abstract dialectics.[3]

[1] BUFNOIR, *Cours de droit civil*, I, p. 543; COLIN et CAPITANT, *Cours de droit civil*, II, p. 318.

[2] Cf. survey of the fluctuations of German Law on this subject in R. HÜBNER, *Grundzüge des deutschen Privatrechts* (1908), pp. 493 ff.; SALEILLES, *De l'obligation en droit civil allemand;* PLANIOL, *Cours de droit civil*, II.

[3] I may mention that the notion of *public policy* is bound to introduce a powerful element of practical reflection restraining abstract

Yet, even here, matters may sometimes assume an aspect which reduces rules to absurdity. Sir F. Pollock gives an amusing instance in connection with the discharge of obligations.[1] "It is the rule of English law that a debt of £100 may be perfectly well discharged by the creditor's acceptance of a beaver hat or a peppercorn, or of a negotiable instrument for a less sum at the same time and place at which the £100 are payable, or of 10/- at an earlier day or at another place, but that nothing less than a release under seal will make his acceptance of £99 in money at the same time and place a good discharge. The rule in *Pinnel's Case*,[2] though paradoxical, is not anomalous. It is the strictly logical result of carrying out a general principle beyond the bounds in which it is reasonably applicable."

The danger of such an abuse of dogmatic construction is much greater under the sway of continental systems. French jurists have lately[3] entered emphatic protests against its deadening influence.

As regards Germany, I will restrict myself to a reference to Ihering, who, himself a brilliant dialectician, has ridiculed the extravagant use of dogmatic construction by pedantic colleagues. A few extracts from his *Scherz und Ernst in der Jurisprudenz* will suffice:

"I had died. A form of light met my soul on its leaving the body.

"You are now free from the ties of the senses that chained your spirit to the body. You need only think of the place you want to go to in order to be there.

"I will try. Where shall I put myself by means of my thought?

deductions. On the meaning of public policy, see *Davies v. Davies* (1886) 36 Ch. D. 364.

[1] *Principles of Contract*, p. 179.

[2] 5 Coke's Rep. 117.

[3] GÉNY, *Méthode d'interprétation*, p. 133: "By substituting for the real elements of juridical life—for the moral, psychological, economic, politic and social motives—technical, abstract, cold notions deprived of fruitful reality, our interpretation of law has created a system of pure formulæ and categories which, in conjunction with the exaggerated influence attributed to a modern code, has rendered the scientific practice of our courts not only sterile, but often harmful."

"As you are a student of Roman Law you will proceed to the heaven of juridical concepts.—Is it dark there?—Quite dark. Here is the apparatus for constructions. It is nice that it should be acting just now. Let us see what is the object of the spirit who is working it.—Mighty spirit, allow us to ask what are you doing just now?—I am constructing contract.—Contract? But that is quite a simple thing; what is there to construct?—A good deal—just because it's simple.—But then what will happen in the case of concepts like rights as to rights, the *hereditas jacens*, the gage in one's own property?—All trifles! I have finished these things off long ago. The only things that interest me beside Contract, are Obligation and Direct Representation.—May I ask what results you have reached as regards them?—As to Obligation—it is a right to an act to be performed by the debtor.—I cannot conceive this at all. As long as an act has not been performed, it does not exist: therefore there can be no right concerning it.—Exist! One sees that you do not belong to our set. What we think—exists, etc."

Logical system of Law.

One form of logical exaggeration has played a particularly important part in the history of juridical thought—it is the assumption that there is a completeness in a legal system which enables the jurist to discover legal principles and to formulate rules even when there is no positive basis for them in statutes or precedents. According to this view there are no gaps in a rational system of law—say the Roman, the French or the English; law, even if not expressed, is latent *in gremio judicum* and will be formulated by the Courts called upon to produce it. This doctrine has been taught by German jurists, for example by Brinz, and it has been used by English lawyers to support the fiction that there is no such thing as "judge-made law" and that Common Law is the logical exposition of pre-existing principles. A modern writer on jurisprudence has attacked this fallacy with great vigour. "The whole science of Jurisprudence does not claim to be anything but a system of rules for the guidance of the judge, for surely no one has ever been foolish enough to imagine that the law embodies

a complete system of rules whereby the course of human action in all possible circumstances can be settled beforehand. Jellinek has already noticed that the dogma of the logical completeness of our legal system does not apply to public law, but only to those branches of the law in which the final decision rests with the judge. The case does not differ when the decision does rest with the judge . . . He is obliged to discover some solution, but this solution is certainly not the product of a logical legal system complete in itself. The only practical object of such a system is to supply the judge with an ample provision of rules to aid him in pronouncing judgment in all possible cases.'' [1]

The fictitious character of the doctrine of the latent completeness of law, let us add, becomes especially apparent when one reflects that its consistent application would lead to the admission that our existing Common Law system was, apart from statutory innovations, in existence in the time of Bracton and of Martin of Pateshull. Those who shrink from such a paradox have to make room somewhere for creative innovation, and can hardly look to any other source of inspiration for the law-making judges than their sense of practical requirements.[2]

However, exaggeration in the use of an effective method ought not to obscure the value of the method when applied with proper caution. When all has been said about the barrenness of pedantic logic, it must be remembered that what we have to deal with in actual reasoning is not formal exercises in school logic, but the *dialectical* treatment of materials, instinct with vital problems and issues. Utility, public interest, morality, justice, are constantly claiming their share in the thoughts of the lawyer, while logic provides him with a solid framework for his reasoning.

1 EHRLICH, *Grundlegung der Soziologie des Rechts*, p. 15.
2 Cf. J. C. GRAY, *Nature and Source of the Law* (1909), § 489, p. 217.

CHAPTER II

LAW AND PSYCHOLOGY

The operation of will in testaments and agreements.

THERE is an aspect of law which brings its close dependence on psychology into a particularly strong light; namely, the fact that law deals with the human will.

Both in civil and in criminal proceedings lawyers are constantly confronted by this mysterious conception of the will, and although they have tried to simplify the subject for convenient manipulation, they are often reminded of the awkward psychological background stretching behind their conventional formulæ.

This is obviously true of the law as to *testaments*. From the most remote antiquity the principal condition imposed on testators by the legislators and courts is the requirement that the testator should be of sound mind at the time when he makes his will. Not only downright insanity or senile debility, but morbid submission to influence is considered in all countries to be a reason for invalidating a will. In Athens, leave to make a valid testament was refused to the insane, to people who had fallen into dotage, to men under the influence of women (*μανιῶν, ἢ γέρων, ἢ γυναικὶ πειθόμενος*). No wonder the law reports are full of cases turning on the question, What is to be understood by the notion of a "sound mind" in relation to civil incapacity?—and one cannot but feel that the whole subject is in a state of uncertainty and transition. I will merely refer to one case in which the will of an insane person supposed to have been made during a lucid interval was granted probate, although the same person had been previously refused leave to execute a deed. (*Re Walker, Watson and others v. Treasury Solicitor.*)[1] "The deceased suffered from delusions, and when under those delusions she would become passionate, violent, and even

[1] (1912) 28 T.L.R. 466.

dangerous. Her obsessions were entirely recognized by herself as morbid and did not prevent her from taking an intelligent interest in general topics. She kept up a correspondence with her relatives and friends, with the Visitors in Lunacy and the Master in Lunacy, and in other respects was a shrewd and clever woman, and her memory was excellent.'' In 1904 she executed a deed creating a trust for the benefit of some relatives, but the Master in Lunacy refused to recognize the validity of the deed and the Court of Appeal confirmed his decision on the ground that the interests of a lunatic so found by inquisition were to be protected by the Committee in Lunacy under the Crown and that the creation of a trust would lead to dual control and a conflict of authorities. Nevertheless, when Mrs. Walker made a will in a lucid interval, this will was granted probate.

It is even more difficult to come to a conclusion as to the dependence or independence of mind of a person, who is not a recognized lunatic.

One of the leading cases on this matter is *Norton v. Relly.*[1] It originated in a bill against Relly, a dissenting preacher, and others, as trustees in a deed of gift executed by Mrs. Norton, granting an annuity of £50 a year to the defendant, praying that it might be delivered up to be cancelled.

The Lord Chancellor in giving judgment for the plaintiff said: ''I could easily have told what by the proofs of his cause, and his own letters he appears to be—a subtle sectarian, who preys upon his deluded hearers, and robs them under the mask of religion; one itinerant who propagates his fanaticism even in the cold northern countries, where one should scarcely suppose that it could enter. Shall it be said in his excuse, that as to this lady she was as great an enthusiast as himself when he first became acquainted with her and consequently not deluded by him? It appears indeed that she wrote some verses 'on the mystery of the

[1] (1764) 2 Eden 286. Cf. *Lyon v. Home,* 6 Eq., pp. 655 ff. (1868): "A widow of seventy-five was induced by a 'medium' to adopt him and to make various gifts and a will in his favour. The relation between them implied domination over her mind." The rule is different in the case of simple contracts.

union of the Father, the Son and the Holy Spirit.' It is true that it appears by this that she was far gone, but not gone far enough for his purpose. She advanced step by step till she became quite intoxicated, if I may use the expression, with his madness and enthusiasm. Inasmuch as the deed was obtained in circumstances of the greatest fraud, imposition and misrepresentation—the defendant, Relly, shall execute a release."

The responsibility for crime.

Even more momentous issues are involved in the necessity of estimating the action of intellect and will as regards the responsibility of a person for crime. The development of criminal law is highly characteristic of a gradual change of views on the subject of individual responsibility. One need not look very far back in history to discover an appalling barbarism in the treatment of criminal offenders. Eighteenth-century England, whose legal system was described and extolled by Blackstone, built up its criminal law on an indiscriminate application of the death penalty, and on purely external tests of responsibility. The spread of humanitarian doctrines embodied in Beccaria's famous book,[1] in Howard's activity and the utilitarian agitation of Bentham, brought about great changes in all directions. But the psychological grounds of criminality remained unexplored and the legal tests of responsibility were still of the most rudimentary kind even in the middle of the nineteenth century. In 1843 a pronouncement of the judges was made in *M'Naughten's Case*[2] with regard to criminal responsibility. It was laid down, among other things, that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the accused was labouring under such a defect of reason from a disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know it was wrong.[3]

Up to quite recent times the legal doctrines applied by the Courts in attributing responsibility even in the case of mental disease did not go further than the admission that

[1] *Dei Delitti e delle Pene* (1764).
[2] *Reg. v. M'Naughten*, 10 Cl. & F. 200.
[3] J. F. Stephen, *History of Criminal Law*, II, p. 153.

a person incapable of distinguishing between right and wrong could not be punished for a crime. "Moral insanity" in the shape of uncontrollable ideas was not recognized as a ground for sending an accused person to an asylum.

Take the case of *Reg. v. Haynes.*[1]

"The prisoner, a soldier, was charged with the murder of Mary MacGowan, at the camp of Aldershot. The deceased was a woman with whom the prisoner had been on the most friendly terms up to the moment of the commission of the offence. No motive was assigned for the perpetration of the act. . . .

"Bramwell, B., in summing up to the jury, said: 'As to the defence of insanity, it has been urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But I must remark as to that, that the circumstance of an act being *apparently* motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable which might prompt the act. A morbid and restless (but resistible) thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much more reason is there why we should not withdraw any of the safeguards tending to counteract it.' "

Later on English law has shifted its point of view.[2] Let us take a simple case which started in the assizes in Leeds. (*R. v. Jefferson.*)[3]

In the Court of Criminal Appeal, an appeal was brought against a conviction for the murder of a woman. It was proved that the accused cut the woman's head in the presence of witnesses and made no attempt to escape, and also that he took certain articles of clothing not worth a penny and brought them away with him. In delivering

[1] (1859) 1 F. and F. 666; KENNY, *Cases on Criminal Law*, pp. 52 f. Cf. VINOGRADOFF, *Common Sense in Law*, pp. 131 f.

[2] See e.g. Lord Esher in *Hanbury v. Hanbury* (1892), 8 T.L.R. 559.

[3] (1908) 24 T.L.R. 877.

judgment Mr. Justice Lawrence said that there was no doubt that the verdict given was unsatisfactory, and in his judgment it ought not to stand. There was strong evidence called before the jury which showed that the man was not in such a state of mind as to make him responsible for his act. The sentence must be quashed, and the order would be that the prisoner should be detained as a criminal lunatic during His Majesty's pleasure.

The general principle which governs the subject at present was summarized by Mr. Justice Bray in *R. v. Fryer.* (24 Cox C.C. 403.) The circumstances of the case were very similar to those in *Reg. v. Haynes.* A soldier had, without any apparent motive, strangled a girl who had been engaged to him. Bray, J., said in his charge to the jury: "For the purpose of to-day I am going to direct you in the way indicated by a very learned judge, Fitzjames Stephen,—if it is shown that he (the accused) is in such a state of mental disease or natural mental infirmity as to deprive him of the capacity to control his actions, I think you ought to find him what the law calls him—'insane.'"

The crucial question of responsibility has to be decided by a jury guided by the general directions of the presiding judge. In this way a small body of laymen representing public opinion in the country have to formulate verdicts as to innocence, guilt and responsibility. They have to make up their minds not only as to the evidence of witnesses and the value of circumstantial indications, but also as to the relative importance of statements by experts, such as doctors in cases of mental disease or morbid influence. From a technical point of view such a method is open to objections, and, though the creation of the Court of Criminal Appeal makes it possible to correct flagrant errors, the verdicts of juries do not always show a high standard of perspicacity.

According to English ideas, however, no better means can be found for submitting cases to the opinion of the community. In spite of all its failings, the jury represents public opinion and gives expression to the com-

mon sense of disinterested citizens. In this matter as in many others, law aims not at perfection or refinement, but at a definite solution on considerations which appeal to average members of the community. For this very reason it is immensely important that popular notions should be brought up to a level with the broad results of scientific study. By imperceptible degrees scientific discoveries are making their way into popular consciousness, and it is the duty of those who are in closer touch with progressive thought—lawyers as well as scientists—to promote by all available means the spread of knowledge on these subjects.

Scientific and juridical treatment.

People are often shy of approaching the psychological study of legal phenomena, especially of crime, because they are afraid of undermining the practical premises of social security by investigating closely the psychological motives of criminals. This apprehension seems based on a pure misunderstanding: the principle of social self-preservation requires adaptation to altered scientific views rather than adherence to antiquated theories and the grappling of juries in every single case with the perplexing problem of responsibility. Tarde has some pertinent remarks on the subject.[1]

Measures of isolation and prevention adopted at the right time may safeguard society from dangerous outbursts on the part of degenerate subjects. In any case, it is obvious that the point of departure of any thorough analysis of the *mens rea* must be sought in psychology.

On the other hand it would be idle to contend that modern psychologists can treat such problems without taking heed of the lawyers' requirements and limitations. For one thing, the latter aim not at discussion, but at a decision. It would never do in practice to dismiss cases as insufficiently ripe for a verdict. Social justice holds the accused in a vice and must direct him either to the right

1 "A medico-legal expert, Mendel, has published a work intended to prove that his colleagues, in answer to the question 'Was the accused in the possession of his faculties?' should refrain from giving any answer. . . . It becomes more and more easy for a lawyer, with the writings of alienists at his disposal, to demonstrate the irresistible nature of criminal impulse which carried his client off his feet."—*Penal Philosophy*, p. 15.

or to the left, must declare him either guilty or not guilty, although in a number of cases there may be great doubts on the point. A *non liquet* verdict in the shape of a disagreement of the jury, only delays final decision and throws the responsibility for it on another set of doomsmen. Now this is not a chance peculiarity nor one which can be easily improved upon. Even in a system like the Scotch, where a "not proven" verdict is possible, it is considered as an exceptional occurrence, and the aim of the proceedings is to reach a definite *yes* or *no* solution of the dispute.

This state of things corresponds to the fundamental difference between theoretical investigation and practical action: the first strives to reflect all shades and niceties of the material, while co-ordinating them as far as possible in accordance with underlying principles; the latter steers according to its best lights towards an end, however incomplete and contradictory the information at hand may be. A pilot navigating a ship, a physician attending a patient, a lawyer conducting a case cannot break off their operations at pleasure: this means in the case of the lawyer that he frequently has to be content with average estimates and approximate truths, sometimes even with artificial presumptions which help to bridge over insoluble difficulties and awkward gaps. Bearing these facts in mind, we shall be in a position to understand the peculiar mixture of theoretical and practical considerations presented by law. In the department of criminal justice from which we started, this mixed character is especially noticeable.

Definitions of crime.

Modern judges and juries cannot be content with a slavish rehearsal of statutory rules. It seems out of the question at present to adopt Bentham's definition of crime as an act which it is deemed necessary to forbid,[1] and yet the superficial character of this statement is still traceable in the definition proposed by Austin and improved upon by an eminent professor of English law in our days: "Crimes are wrongs whose sanction is punitive, and is remissible by the Crown, if remissible at all."[2] One might wonder

[1] *Works*, I, p. 81. (*Principles of Morals and Legislation*, ch. xiv.).
[2] KENNY, *Outlines of Criminal Law*, p. 15.

why the possibility of remission is both inserted in the definition and declared not to be essential to it. But the principal objection to such a definition seems to be, that it is purely "extrinsic," and that to that extent it begs the question it is supposed to answer. We start from the fact that certain acts are punished by the State, but we want to know *why* the State assumes such a power in respect of its citizens. It is not enough to point to certain peculiarities and contradictions of positive law, as it has been shaped in the course of history, in order to render an intrinsic definition unnecessary or impossible. As a matter of fact, the principal "intrinsic" definitions (among them those of Blackstone and of Stephen) are not so widely different or so incomplete as it might seem at first glance. Crime is generally understood to be *a revolt of the individual against society*, and the questions as to the methods of reacting against such revolts and of the measure of sensitiveness in the social body towards them are subsidiary questions which do not go to the root of the matter.[1]

Modern teaching as to ideas.

It is out of the question to review all the theories brought forward by modern psychologists: we have to leave their discussion to specialists. But it is desirable to point out whom we intend to follow, as there are many roads towards the goal and a jurist has to make up his mind which to take. The teaching as to the association of ideas, developed by Locke, Hume, J. S. Mill and Bain may serve as a starting-point. It showed the necessity of analysing perceptions in a way entirely different from the logical one, and to explain their combinations by contact in the course of experience rather than by subdivision and subsumption under abstract categories. The associationists dealt, however, in a one-sided way with ideas as phenomena of cognition, and when they took up the problems of emotion and volition, they approached them from an intellectualistic point of view, as products of formulated thought.[2]

1 On the literature of criminal law see, e.g., BEROLZHEIMER, *Strafrechts Philosophie*, 1907.

2 WUNDT, on "Psychology," in WINDELBAND'S *Philosophie im Beginn des XX Jahrhunderts*, p. 6: "In Wolff's *Deutsche Psychologie* and in the writing of his successors we find the meanings of the words 'to think' and 'thought' extended in a remarkable way to

Reflex and Energy.

The next stage was reached by a materialistic synthesis on a physiological basis, as represented by Fechner, F. Maudsley, Ribot, etc. The aim was to establish a direct dependence of the mental process on the physical one. All facts of consciousness were considered as *epiphenomenal reflexes* of physiological processes stimulated by the impact of outside objects on the receptive organs of the nervous system. From this point of view ideas could be compared to the movements of the meter registering the pressure of steam on the engine—not productive in any way, but merely manifesting the organic process.[1] James, Lange and others have carried the psycho-physiological hypothesis even further into the domain of feeling and of volition. In their view, the feelings of joy, sorrow, anger, fear, are consequences of changes produced directly by impressions from the outside world. These impressions call forth reflexes in the shape of accelerated action of the heart, a stiffening of the muscles, tears and the like; the sentiments which were supposed to call forth these physiological changes are in truth only consequential emotions produced by physiological reflexes.[2] In the same way, the exertion of the will was supposed to be only a phenomenon of consciousness, producing a mistaken notion of activity where in truth there is a passive state of the organism reflecting impulses which come to it from the outside. This reversal of the usual meaning of terms and of common-sense experiences is not called for by the necessities of analysis and leads to absurd conclusions. As James Ward has put it: "Let Professor James be confronted first by a chained bear and next by a bear at large: to the one object he presents

all kinds of psychic values; similarly the word 'idea' is used in the works of English and French psychologists of this and the preceding period in an all-embracing sense; these are eloquent and tangible proofs of the tendency to resolve all actual qualities and differences in one and the same medium of logical reflection."

[1] E.g. RIBOT, *German Psychology*, p. 215.

[2] E.g. LANGE, *Les Émotions*, trad. par G. DUMAS, 1902, p. 10: "Emotion then is the outcome on the one hand of more or less localized sensations, on the other of vascular and muscular states; let us not therefore speak any more of these mysterious entities which are called fear, anger, joy, or, if we speak of them, let us clearly recognize that they express the ill-defined consciousness of a certain number of movements. It is a matter of pure mechanism."

a bun, and to the other a clean pair of heels. Professor James would remind us that in his nomenclature 'it is the total situation on which the reaction of the subject is made.' But there is just a world of difference between 'object'= stimulus transformed by preorganized mechanism into an efferent discharge, and 'object'=total situation to which the subject reacts.'' [1]

Altogether it may be said that the physiological school in its eagerness to establish an immediate connection between mental states and their physiological substrata has gone beyond the mark. It is not necessary and not admissible to eliminate the mental process in order to assign the physical process its due share. In psychology we can no more do without the subjective side of our thoughts and emotions than we can do without their objective premises. Consciousness once created becomes a powerful agent in itself and one of the means for carrying on evolution. This has been emphasized in every way by Alfred Fouillée.[2] Rightly construed, his theory of ideas as forces gets rid of the supposed passivity of the mind and lays stress on the most elementary form of its conscious reaction against the outer world.

Mental unity.

In the present stage of psychology, its most influential exponents may be said to have adopted the view that the mental process presents a unity (*psychosis*) distinct from the physiological process, though intimately connected with it. In its relations to the outside world the mind is both receptive and active, receptive in so far as it receives impressions, and is excited by them to emotion; active in so far as it transforms its impressions and emotions by reasoning and volition. The vital knot between reception and activity is formed by *attention,* that is, by the selection of certain facts for mental treatment.[3]

Such a view excludes the old subdivision of the mental

[1] *Enc. Brit. Art. Psychology* (1st ed.), XXII, p. 586.

[2] A. Fouillée, *L'évolutionnisme des idées-forces,* p. 196: "This development of energy is not a creation of energy, nor a free direction of energy; physically it is the passing of one kind of energy into another, of the force of tension into the force of translation; psychologically it is the passing of a conflict of ideas and of desires into determination." Cf. Wundt, *Logik,* I, p 24.

[3] J. A. Ward, *Psychological Principles* (1918), p. 57.

current into *faculties*. It regards consciousness as the subjective aspect of the mental process itself and prepares the way for it by selective attention. James (*Principles of Psychology*, I. 400) rightly notices the insufficient treatment of attention by rival psychological schools: "Empiricists ignore selective attention, because they wish to account for all products of experience by laws of association which cluster things together independently of the activity of the subject, and idealists, in the interests of the ideal order, regard experience as dictated by the objective selection of pure thought."[1]

The fundamental change of point of view has led to a revision of all the principal doctrines as to the functions of the mind. As regards the intellect, it cannot be considered any longer as the predominant partner in the mental process. The assumption of metaphysical rationalism and of empirical intellectualism about *ideas* as primary elements of human consciousness have been shown to be erroneous both as to the insoluble character of these supposed elements and as to their combinations.

We have now to guard against the opposite exaggeration. We understand that mental processes cannot be treated as mere physiological reflexes: such a view would result in absurdity—in denying the special character of psychic phenomena; or else would claim for these phenomena the position of effects without causes.[2] But although such a materialistic conception may be said on the whole to have been abandoned by leading psychologists, a tendency to dwell chiefly on the animal processes in the human mind is still very prevalent. It has its natural explanation in the extensive study of animal societies and of savage tribes, but it ought to be balanced by considering the progressive

[1] Wundt's theory of apperception brings into strong relief the element of selective activity, but contains doubtful points from the philosophical point of view. See article on "Apperception" in HASTINGS' *Encyclopaedia of Ethics and Religion*.

[2] FOUILLÉE, *op. cit.*, p. 164: "When consciousness exists, outside the conditions of unconscious phenomena, a new condition is added to the previous ones, the condition of consciousness, whatever this may be; otherwise this would be a case of an effect without physical causes."

aspect of human history and the immense difference between human and animal development taken as a whole. The decisive cleavage in this respect is marked by *language:* it provides the human race with an instrument for mental intercourse and reflection to which there is no equivalent in the animal world. While animals possess means of expressing their emotions by varied cries, man alone has elaborated speech as a method of intellectual formulation. The importance of language in logic has been sufficiently appreciated and explained by writers on the subject. But its importance in psychology is certainly as great. It makes it possible for the individual to communicate not only with his immediate neighbours, and not only in respect of elementary wants and feelings: it raises individual consciousness to social consciousness in all tribes and all nations of the world. And as the chief operations in forming language are logical operations, language tends necessarily to increase the share of the intellectual function in human life far beyond the spiritual range common to man and the animals.[1] Once this step in the growth of speech has been achieved, the influence of reasoning and reflection proceeds in human development with ever-increasing and cumulative force. Through the power of formulating ideas man obtains a greater control over the unformulated impulses of his nature, and this certainly contributes to the setting up and to the enforcement of moral standards; reflection as well as imagination find vent in religious beliefs and religious worship. Altogether, the evolution of human civilization is unthinkable without the guiding thread of intellectual intercourse and speculation.[2]

Spiritual development.

[1] TARDE, *Psychologie économique*, 1902, p. 113: "It is impossible to account for the superior designs of art, luxury, truth, justice, or to define the notions of credit or of value without invoking the constant interchange between human sensibilities, intelligences, and wills in their perpetually changing impressions.—They cross each other's lines ceaselessly."

[2] WUNDT, *Lectures on Human and Animal Psychology* (translated by Titchener, 1894), p. 350: "It seems that the entire intellectual life of animals can be accounted for on the simple laws of association. Nowhere do we find the characteristic marks of a true reflection of any active functioning of the imagination or the understanding—you may remember the story in Pliny's *Natural History*

Emotions and Instincts.

This principle should be firmly borne in mind when we come to consider the modern aspect of the theory of *emotion*. It was recognized long ago that a purely intellectualistic interpretation of human life would reduce it to a colourless scheme of premises and conclusions. Tone and rhythm are imparted to it by the currents of appetite and satisfaction which run through every moment of human as well as animal existence. And the discoveries in the field of heredity and development have shown that these emotional currents are not restricted to the life of single individuals. In combination with cognitive processes they form inheritable tendencies, habits and instincts which themselves serve as stepping stones for further evolution.[1] By observing the animal world, this feature is made especially clear in its final results and sometimes in its gradual stages. We all know what remarkable effects the accumulation of experience, together with hereditary transmission, has produced in the habits of bees and ants, and it is a legitimate surmise that similar processes have played a great part in preparing the various customs of human tribes.[2]

of the elephant who was punished during a performance for his bad dancing, and who secretly set to work to practise in the night so as to do better next time? Are we likely to accept the story and the explanation?"

P. 357: "The criterion of intelligent associative action and of intelligent action proper can only be this—that the effect of association does not go beyond the connection of particular ideas, whether directly excited by sense impressions, or only reproduced by them, while intellectual activity, in the narrow sense of the word, presupposes a demonstrable formation of concepts, judgments and inferences, or an activity of constructive imagination." Cf. the authoritative summing up of BOAS, *The Mind of Primitive Man* (Annual Report of the Smithsonian Institution, 1901, pp. 451-60). See also HOBHOUSE, *Mind in Evolution*, 321 ff.

[1] MACDOUGALL, *Introduction to Social Psychology*, 8th ed. (1914), p. 29: "[Instinct] an inherited or innate psycho-physical disposition which determines its possessor to perceive and to pay attention to objects of a certain class, to experience an emotional excitement of a particular quality on perceiving such an object, and to act in regard to it in a particular manner, or at least to experience an impulse to such action." Another definition of instinct in HOBHOUSE, *Mind in Evolution*, 70 ff.

[2] MACDOUGALL, *ibid.*, p. 7: "The truth is that men are moved by a variety of impulses whose nature has been determined through long ages of the evolutionary process without reference to the life of man in civilized societies. The problem is, how can one account

The real difficulty arises when we try to apportion the share of emotional and of cognitive functions in accounting for the complex results. It has to be recognized, to begin with, that it is impossible to make a clear distinction between instincts as such and inherited habits or capacities: one variety shades off imperceptibly into the other, and their fluid differences depend entirely on the greater or the lesser degree of unconscious determination. Cats and dogs have a proverbial repulsion one to the other, and yet it has often happened that kittens and puppies have been brought up to live together in perfect amity. Gipsies are well known vagabonds and horse-thieves, but many scions of the gipsy race have managed to live the life of ordinary law-abiding citizens.

Besides, the variety of combinations of nature and environment are so great that we can only strive to mark off the principal tendencies of development, but not their innumerable ramifications. For this very reason it is misleading to attempt a permanent tabulation of primitive instincts on an emotional basis: such a tabulation is bound to be arbitrary and confused at the same time. Is there, e.g., sufficient reason, for surmising a primitive instinct of *self-abasement*, though a dog generally slinks with his tail between his legs when he meets a redoubtable specimen of his kind? Surely the instinct of self-preservation with its natural consequence of fear is sufficient to explain such occurrences. Or is it absolutely necessary to tabulate the opposite feeling of self-assertion (pride, vanity, etc.) as a special primordial instinct? The sentiment of self is wide enough to embrace this and other expressions of an egotistic state of mind. *Curiosity* again can hardly be understood without introducing the element of cognition.[1] The only motive for establishing these complicated distinctions seems to be the wish to reduce the forms of civilization to developments of habits common to men and animals. But, whatever may be our speculations as to the connecting links between apes and primitive man, there is after all the vast

for the fact that men so moved ever come to act as they ought, or morally and reasonably."

[1] MacDougall, *Social Psychology*, pp. 49 ff. holds a different view of these matters.

world of experience as to subsequent stages of human history to be accounted for.[1]

Altogether, it seems scarcely scientific to build up an edifice of more or less differentiated "instincts" in order to prove the influence of heredity and custom on social life. If, however, we set out to trace hereditary habits to their ultimate sources we shall hardly get beyond modifications of selfishness and altruistic attraction on the one hand, and the substitution of unpremeditated reflexes for reasoned action on the other: such a substitution can, of course, take place in the experience of an individual—say, in learning to walk—as well as in that of a hereditary group, e.g., in the formation of peculiarities of dialectic speech.[2]

The Will.

The idea of the *will* as a special faculty separated from cognition and feeling has been abandoned by modern psychological analysis. It is recognized only as the appetitive side of the mental process and, as such, it appears in the germ in every manifestation of feeling whether we call it conation, desire or appetite. In so far as any fact of attention is conditioned by a certain stress of mental activity, the will takes part in all the various stages of the process of cognition—in perception, reflection, reasoning, exertion of memory and imagination. The illusion of a faculty distinct from the intellect and from feeling is created by the fact that the manifestation of the will being a final act, a solution of the previous psychical tension, it is reflected in consciousness as a movement in opposition to motives, as a creative act in opposition to its preparation.[3] This reflection of the will in self-consciousness is at the root of the famous controversy between the upholders of a free will and the determinists. In spite of self-consciousness, no

[1] MacDougall, *op. cit.* Cf. the curious explanation of self-consciousness, pp. 247 f.

[1] *Ibid.* Cf. the curious explanation of self-consciousness, pp. 247 f.

[2] Wundt, *Völkerpsychologie*, I, 1, p. 11: "The domain of voluntary actions derived from considered motives lies outside the range of social psychology. The latter is confined to the domain of instinctive action."

[3] Giddings, *Inductive Sociology*, p. 269: "Psychical determination is the *free exercise of will not the exercise of free will*—in so far as volition is the expression of one's own mental constitution—from hereditary tendency and present sensations to reason and conscience. It is an internal and psychical as distinguished from external and physical necessity."

action and no will can be thought to be causeless. In fact, the will appears as the last link in an endless chain of causes ranging from the immediate impulses which led to the exertion of will-power—to the remote conditions shaping character and circumstances. In this way it may be taken for granted that every act of a man is pre-established by previous states and events. If, however, the point of view is shifted and we reflect on our will as the efficient cause of change, and on our actions as springing from our resolve, we are conscious of this resolve as of a *choice* between possibilities, and sometimes we may watch the conflict of motives which prompt us in various directions. The conception of free will is therefore a fact of consciousness in which, though unable to ascertain the exact combination of factors, we oppose the various influences preceding action to the resolve which initiates it. The appeal to reason in the choice of possibilities is perfectly justified, and the formula of *free will* comes to mean in substance that men do not follow impulses blindly, but are normally able to act in accordance with their reason and morality.

Moralists.

The discussion as to free will has brought us to a general problem which has been the subject of inquiry ever since men began to reflect philosophically—namely, to the problem of the origin of the moral ideas. The problem is undoubtedly of such fundamental importance that it cannot be considered exclusively as a special topic of psychological investigation: all the schools of human thought approach it in connection with their general conceptions of the world and of the destiny of man, that is, under the direct influence of their systems of synthetic philosophy. For our purpose, it may be sufficient to treat the subject as a necessary premise of the jurisprudential doctrine of right and duty. It may be taken for granted that the extreme view which goes to deny the existence of any but selfish motives in human nature must lead, if consistently developed, to a revolt against all social conventions.

The diatribes of Nietzsche are eloquent expressions of the contempt of the "superman" for the human herd: he

deems himself a god and an animal at the same time. These views do not only account in a striking manner for present development, but they are at the same time a reduction to absurdity of the struggle for power in the moral world. It may be appropriate to consider some pronouncements of the prophet of natural license. "To train an animal that may make promises—is this not the aim which nature has set itself as regards man? We find as the ripest fruit of the tree the sovereign personality—emancipated from customary morality, the autonomous supermoral personality—briefly, the man endowed with his own independent, far-reaching will, who may make promises. Being such a free man, this lord of his free will, the sovereign, how should he not know to what extent he is superior to every one that may not make promises and affirmations in his own right? The free man, the holder of a far-reaching indestructible will, has his own standard of value; looking out from his own self to the others, he treats them with respect or contempt. He honours his equal, the strong, the trustworthy—but he will kick the whining curs who promise without leave, and he will flog the liar who breaks his word at the very moment when he utters it." (*Works, VII,* 343, 344: *Die Genealogie der Moral,* 2, aph. 1, 2.)

"Naturalistic morality, that is healthy morality, is ruled by the instincts of life. Unnatural morality, that is morality as it has been almost always taught, respected and preached until now, is directed against the instincts of life, it is a condemnation of these instincts, either a concealed or an open and impudent condemnation." (*Works, VII,* 88: *Götzendämmerung, Die Moral als Widernatur,* aph. 4.)

"Selfishness is worth what the person manifesting it is worth from a physiological point of view; it can be worth a great deal and it can be worthless and contemptible. Each individual has to be considered as the representative of growing or of waning life. Altruistic morality, a morality that cripples selfishness, is a bad sign under all circumstances. This applies to the individual. It applies

even more to nations." (*Works, VIII,* 140, 142: *Götzendämmerung, Streifzüge eines Unzeitgemäszen,* aph. 33, 35.)

Utilitarians.

It is something of an anticlimax to survey the pale statements of popular utilitarians after having caught a glimpse of the fierce glare of Nietzsche's invectives. The utilitarian doctrine starts with a characteristic attempt to build up ethical precepts on a speculation as to blessings in the life to come. Listen to Paley (*Moral Philosophy,* ed. 1838, III, bk. ii, chap. iii): "Why am I obliged to keep my word? The answer will be: Because I am urged to do so by a violent motive, namely, the expectation of being after this life rewarded, if I do, and punished for it if I do not, resulting from the command of another, namely, of God. Therefore private happiness is our motive, and the will of God is our rule."

"The method of coming at the will of God concerning any action by the light of nature, is to inquire into the tendency of that action to promote or diminish the general happiness" (III, bk. ii, ch. v).

"Whatever is expedient, is right. It is the utility of any moral alone which constitutes the obligation of it" (bk. ii, ch. vi).

Hardly more satisfactory are the modifications of "hedonistic" doctrine advocated by Bentham and his school. It has often been shown that the notion of the greatest happiness of the greatest number is vague in all its elements. The calculus of happiness could not be effected on anything like scientific principles even if we had made up our minds as to the unit of measurement: how are accumulations of welfare in some cases to be balanced against diminutions of welfare in other cases? And, what is worse, what is happiness to consist of, and to what unit are ideas of happiness to be reduced in order to apply a computation? The only possible unit that suggests itself to Bentham is the enjoyment of material goods, and this is obviously too narrow a basis in the case of the moral world.[1] The standard of success suggested by the "pragmatists" is not of a more abiding nature. What is success in social life? We all know how little value is to be attached to

[1] Cf. Wundt, *Ethik,* p. 362.

external prizes. And if spiritual benefits and achievements have to be taken into consideration, then the question arises again, what is the unit and measure of success?

In view of the evident failure of doctrines derived from individual egoism, and of the fact that selfishness is absolutely inadequate to explain the existence of society, the utilitarian doctrine has been modified in two directions: on the one hand sympathy has been claimed as a basis for *altruistic* behaviour, on the other, social pressure in the shape of various forms of education has been recognized as the principal factor in the formation of moral ideas.

The original conception of sympathy, as developed by Hume, may be reduced to a kind of derived and enfeebled egoism; and it cannot be said that the reproach of trying to counterbalance strong psychological motives by weak ones can be removed from subsequent developments of Hume's theory.[1]

A certain modification was introduced by Adam Smith, who laid stress on *objective* participation in the feelings and suffering of our fellow-men, as distinct from any *subjective* putting of oneself into one's neighbour's place.[2]

The assumption of independent emotions of affection and tenderness certainly contributes to a fuller understanding of human thought and behaviour, although it destroys the unity and simplicity of a psychological theory of morals.

[1] HUME, *A Treatise on Human Nature*, Pt. II, Lect. II (ed by Green and Grose, 1874, II, 271): "It is only from the selfishness of man and the scanty provision nature has made for his wants, that justice derives its origin. Though in our actions we may frequently lose sight of that interest which we have in maintaining order, and may follow a lesser and more present interest, we never fail to observe the prejudice we receive either mediately or immediately from the injustice of others . . . We partake of their uneasiness by *sympathy*. The general rule reaches beyond those instances from which it arose, while at the same time we naturally *sympathise* with others in the sentiments they entertain of us"

[2] On the contrast between Hume's and Hutcheson's conceptions see WUNDT, *Ethik*, p. 286: "According to Hume this sympathy which we feel for actions that do not concern us personally, springs nevertheless from egoism, because we should not feel sympathetically towards virtue if we did not put ourselves in the place of those who draw an advantage from their virtuous actions. Hume's sympathy is therefore a very different thing from those feelings of benevolence and general love of humanity which Hutcheson has made the basis of his ethical doctrines."

Social utilitarianism.

In order to get rid of the uncomfortable contrast between egoism and altruism and to reduce the two sets of motives to one principle, psychologists have been led to *social utilitarianism*. According to this doctrine altruistic habits and feelings are produced in man, as well as in animals, by the growth of instincts tending to the conservation and the success of the species. Mimicry might be cited as a biological example of such adaptation promoting the success of a group in the struggle for existence, namely, the mimicry illustrated by the survival of animals which assume the shape and colour of their surroundings. Even more significant are the effects of combination: birds which congregate and hold together have a better chance of crossing the sea in their migrations than those which do not; ants and bees have been taught by experience and instinct to work together and to sacrifice themselves for the common interest of the ant heap or of the beehive.[1]

The history of man from this point of view presents all kinds of varieties of individual adaptation to social needs and requirements. Such adaptations may have been partly intentional, and partly unconscious results of the survival of individuals endowed with qualities contributing to success in the struggle for life: the fierce and courageous, the wily and prudent, would have advantages which are transmitted to subsequent generations by means of heredity. Such instances are most obvious, and, of course, all traits making for closer alliance, for mutual support, are sure to contribute to success in the competition between social groups. Still, no one is likely to maintain that motherly care or the affection between lovers is primarily attributable to survivals of competitive advantages.[2]

1 ESPINAS, *Des Sociétés animales*, p. 57: "Mankind accomplishes its first stage of evolution—in the individual and in the species—invents and perfects its first arts without manifesting reason in its analytic and explicit form. Why should not the animal do the same during the entire course of its evolution?"

2 On the elementary altruistic impulses in human nature see WUNDT, *Ethik*, p. 229: "We have found [the psychological] elements [of morality] to be certain moral instincts which may develop on different lines and therefore manifest themselves with great variety in practice, but remain intrinsically identical They have produced the two great spheres which we have found to be the chief

Social Education.

The educational aspect of social utilitarianism is certainly of great importance. The point has been urged very strongly by Ihering in regard to morals as well as to law. He calls attention to the various rules imposed by social groups on their members by way of convention and custom, all tending to organize and discipline individuals for the sake of carrying out various forms of common undertakings. The habits of a set of men in regard to clothing, forms of address, etiquette, fashion, form themselves into rules of conduct which single persons find it difficult to transgress.[1] Codes of honour and of professional behaviour are even more exacting. Religious bodies enforce conformity with their confessional tenets and with their moral requirements. The State formulates its claims by means of compulsory laws. Rules of moral obligation and conceptions of moral right are of the same origin. All the varieties of moral restraint are originally either the outcome of instincts useful to the species, or the results of reflection and experience on the part of social groups as to their aims and requirements. Such reflection and experience carried a step further by education and custom form a body of rules of conduct entirely distinct from the aspirations of individual egoism and providing the necessary checks on the latter.[2]

There is a good deal of truth in these observations, but they do not constitute the whole truth. As in the case of sympathetic altruism, we are confronted in the case of social requirements with a principle which, in itself, could be regarded only as supplementary or secondary in comparison with the innate force of selfishness. People may be drilled into docility to some extent by the associa-

and never-failing expressions of moral life, namely *religious ideas* and *social intercourse*.

"Corresponding to these two great, universally recognized, groups are two *psychological elementary motives*, the general recognition of which rests on the constancy with which they are active in human consciousness, namely the feelings of *veneration* and of *affection*"

[1] IHERING, *Zweck im Recht*, II, pp. 258 ff.; VINOGRADOFF, *Common Sense in Law*, pp. 19 ff.

[2] IHERING, *Zweck im Recht*, I, p. 43 (popular ed.); LISZT, *Strafrechtliche Aufsätze*, I. pp. 144 ff.; DURKHEIM, *Les règles de la méthode sociologique*, IX, p. 11.

tion of ideas, by influence and custom, as animals are drilled to obey their tamer, but the universal prevalence of moral restraints must have its roots in individual nature in order to stand the strain put on it by interests and desires. It is only when a starting-point for a controlling force has been discovered in the nature of every individual that the complicated machinery of moral ideas can be set in motion by the pressure of social requirements.

Conscience.

The solution of the problem was supplied long ago by the common opinion of mankind: it lies in the fact that man, as a reflecting being, is constrained to judge his own acts as well as those of others. *Conscience* is not a new notion, but it is not an antiquated notion either. Whatever we may desire and do, our eyes are open to our own doings and we estimate them more or less explicitly at their value in accordance with principles, distinct from the particular motives which may have prompted our action. This necessity of reflection, the appeal to impersonal verification, holds good not only in the case of reasoning but also in that of conduct. Of course, men sin against conscience, as they err against logic: the modern Attila proclaimed his righteousness, mercy and piety at the very time when he plunged the world into a hell of lawlessness and cruelty. But sin and error are not to be wiped out by impudence. *Securus judicat orbis terrarum!* Conscience is inherent in the human mind, it is as much a necessary form of appreciation of actions as space and time are necessary categories of our experience of phenomena. To Kant belongs the great merit of having expressed in philosophical terms the foundation of moral ideas. The process of judgment entailed by it necessarily takes the shape of a comparison between the given act and the ideal act, between what *is* or *has been* and what *ought to be* or *ought to have been*, between the concrete achievement and the general rule.[1] Where there is judg-

[1] SIMMEL, *Kant*, p 54: "If we recognize as a fact a categorical ought, a compelling law in ourselves above our will, and obedience to it as the foundation of all morality—how can we reconcile this with the thought that freedom is the greatest of all values? The deepest sense of Kant's Ethics lies in the assertion that this

ment as to past or present, there are imperative obligations as to the present or the future. Such obligations are categorical, because free reason decides not on the arbitrary choice of the persons concerned, but on the strength of universal requirements. The fact that imperatives of this kind are often disregarded does not in any way alter their nature as rules of conduct. The general direction for the individual in connection with moral problems is to act in such a way that his rule of conduct may be accepted as a law of universal application.[1]

It may be added that the gradual shading off from judgments of conscience on a high level of human development to rudimentary forms of moral reflection in children and animals, is in no way an argument against the existence of the category of duty in conscious beings. With children and animals the working of the mind in this groove is usually prompted by acquired habits or by inherited instincts, but this only means that the contents of their moral judgments are supplied by these methods. The *possibility* of providing such contents is conditioned by the faculty of estimating conduct. This faculty cannot but differ widely in the case of different species and of various individuals within each species—a familiar instance is supplied by the difference in this respect between dogs and cats. All our surmises as to the working of animals' minds are necessarily hypothetical in the extreme, as we have no means of communicating with animals in the same way as we do with our fellow-men. Our observations of the self-sacrificing devotion of bees to the hive community or of the household virtues of birds are merely external and devoid of the background of psychological introspection. Under these circumstances it is hardly allowable to make the supposed limitations of the animal

contradiction does not really exist . . . Man can exert his free will only according to an absolutely general law and conversely only a will acting according to the categorical 'ought,' can be called free. It is Kant's leading strain [*Leitmotiv*] that this general law imposes itself on every one from within, and is produced in the very well-spring of personality."

[1] Cf. CAIRD on *Kant*, II, pp. 142 ff.

mind an argument against the development of conscience in man.

Form and Content in Morals.

A most important feature of the "subjective idealism" formulated by Kant, and taken up again by modern thinkers who do not wish to surrender to sensualism and rationalism, is the distinction between the *formal* and the *material* elements in morality. The imperative of *duty* is a category of the human mind, but the actual precepts as to duty are not innate in any sense. They are suggested by historical circumstances in the widest sense of the term, including personal surroundings, inherited habits, social customs, educational ideals, laws.[1] They vary from age to age, from country to country, from school to school, although the conditions of human intercourse and the similarity of fundamental problems ensure a good deal of traditional continuity and some universality of principles.[2] I should like to emphasize at this point that although historical evolution and social influence come fully to their right in such combinations, it would be erroneous to suppose that the framing of moral ideals is to be always regarded as a direct response to social requirements. We undoubtedly have to recognize the power of national consciousness and of universal sense of right to make men face privations of all kinds and give their lives for a good cause, but we should not forget that most powerful moral impulses in the history of mankind have come from personalities who stood not for the common agreements of their contemporaries, but for a burning ideal of truth and righteousness. Moses and Buddha did not receive their inspiration from the Philistines or from the Sophists of their day, and their ideas did not achieve victory by the help of the ballot.

1 NATORP, *Sozialpädagogik*, p 39

2 BRUNO BAUCH (Windelband's *Philosophie im XX Jahrhundert*): "Evolutionist morality arrives at a similar conclusion although it does not lay stress on the necessary connection between the category of duty and the concrete duties." See, for example, DURKHEIM, *Le Suicide*, p. 226: "All this super-physical life is awakened and developed not by cosmic but by social means It is the action of society that has excited in us these sentiments of sympathy and solidarity which incline us towards one another; this it is which, fashioning us after its image, has penetrated us with these beliefs, religious, political and moral, which govern our conduct." Cf. p. x.

This does not mean that the prophets and martyrs are detached from the history of their time: on the contrary, they reveal its most intimate needs and aspirations. But they have to break through the crust of prejudices and recognized interests, and to give shape in a distinct form to the confused cravings of nations.[1] Prophetical activity may be said not only to discard old rules, but to introduce new values, in as much as it obtains currency and influence for new ideas. And it is not only in such exceptional cases that the freedom, the sovereignty of personal spirit over surrounding conditions manifests itself, but also in countless instances when smaller men obey the dictates of their conscience in opposition to commands imposed by social authority: the three youths who refused to worship the statue of the King, the Christian confessors who gave their lives for the sake of their faith, the assertors of free thought and political liberty who did not shrink from the Inquisition, have expressed by their actions the claim to oppose outside pressure in the name of conviction and conscience, and their opposition is to be considered as much a social fact as the pressure brought to bear on them, quite apart from its success or failure in given circumstances.

It would be superfluous to point out the close connection of the psychological and ethical doctrines just mentioned with the theory of law. No teaching on the theory of law can afford to ignore questions as to the interdependence of the functions of the mind, the analysis of instinct and passion, the study of the will, the cross currents between morality and law, etc. We shall have to revert to these questions again and again when we come to examine the development of systems of jurisprudence.

[1] CARLYLE, *On Heroes and Hero Worship* (The People's Library, pp. 49, 50), "The Hero as Prophet": ". . . Such a man is what we call an original man; he comes to us at first-hand A messenger he, sent from the Infinite Unknown with tidings to us We may call him Poet, Prophet, God:—in one way or other, we all feel that the words he utters are as no other man's words . . . It glares in upon him. Really his utterances, are they not a kind of 'revelation';—what we must call such for want of some other name? It is from the heart of the world he comes."

Stages in the development of criminal law.

Let us come back to the evolution of criminal jurisprudence and look at it in the light of modern psychological research. Although crime and punishment have faced one another right through history, the manner in which the two notions have been adjusted as regards each other has varied in a significant way. In the beginning of civilization punishment was a violent reaction against harmful acts, a form of self-defence. This gave rise to the blood feud and to revenge for personal injuries. The action of the avenger may be spontaneous, or induced by common opinion, but the correspondence between injury and the recoil is obvious in both eventualities. In a second stage political communities of various kinds assumed judicial authority and carried out retribution in the name of the government. In a third stage, after the great progress achieved by human individuality with its lofty ideals of freedom and justice, the problem has been shifted from the sphere of struggle with the offender into the sphere of justification of the judge. Instead of being a form of instinctive self-defence criminal punishment became a measure of social education.[1]

As Liszt has very properly expressed it, punishment gradually comes to be understood as a means towards an end, the end being to counteract criminality.[2]

The new developments in scientific psychology were bound to affect the theory of crime and punishment, and they are beginning to react on penal legislation. Commissions instituted to review the field of prison management and penal servitude have come to the conclusion that when punishment renders the persons subjected to it worse than they were before, it defeats its own purpose.[3] It is widely recognized both in England and on the Continent that the present system of a machine-like correspondence between abstract entities designated as crimes, and penalties graduated on external standards, leads to a formal casuistry

[1] On the general evolution of ideas as to criminal law, see MAKAREVICZ, *Einführung in die Philosophie des Strafrechts*, 1906.

[2] LISZT, *Strafrechtliche Aufsätze*, p. 83.

[3] FERRI, *Criminal Sociology* (English translation), p. xii.

against which healthy moral feeling and social experience rise in revolt.[1]

Anthropological researches in criminal law.

One of the Italian writers who have done so much of late to throw light on these momentous problems has described in striking words the general effect of the fermentation which is spreading in the midst of society at large in connection with questions of criminal responsibility. "It was natural to suppose that by means of the condemnation of the guilty to several years of imprisonment, society was sufficiently protected against him and his like. But when, over and above these causes, one discovers still deeper ones, of which the former are only the result, when, for example, one is concerned with the perversity of the thief's predecessors, his education, his shameless mendicancy, the petty larcenies which were his apprenticeship during his childhood, his shameful loves, and his sorry associates . . . then society feels less secure because it feels itself the more threatened. On the whole, free will being denied, society understands that it has not a single force, accumulated and isolated in a single individual, to contend with, but that it stands face to face with a complexity of forces converging in an individual; its anger against him becomes less, and its peril is thereby increased."[2]

Yet when one takes stock of the whole range of modern

[1] TARDE, *Penal Philosophy*, p. 30: "Penal law . . . was degenerating into a sort of fictitious casuistry, where the classifying of entities makes us lose sight of realities, and where we are engaged with offences, with the manner of being of offences, and their relation to penalties, and never with the offenders and their relation to good people Here we have neither psychology nor sociology, nothing but ontology." Cf. GAROFALO, *Criminology*, p 55: "The jurist studies crime only in its external form; he makes no analysis from the standpoint of experimental psychology . . . What concerns him is . . . the classification of facts according to the rights which they infringe—the quest for the punishment which proportionally, and 'in abstract,' is a just punishment, not for the punishment which experience has proved efficacious for the diminution of crime in general." The change of treatment in Great Britain is reflected among other things, in the recent legislation as to penalties, which leaves a wide scope to the discretion of the Court. See, e g, Criminal Justice Administration Act, 1914 (4 and 5 Geo. V, c 58), Cl. 10, 12, 16, etc.

[2] CARNEVALE, *Critica penale* (Lipari, 1889), ref. to by TARDE, *Penal Philosophy*, p. 15.

criminological inquiries, one finds that there is no reason for disquietude on the part of lawyers or of the public. The movement is certainly part of a great crisis which has come over the civilized world, and in so far its course will be affected by the progress of thought in all the higher regions of human speculation. But, apart from that philosophical atmosphere which is common to all branches of study, the specific evolution of criminal jurisprudence does not present insoluble difficulties and fatal contradictions.

A kind of panic was produced by the discoveries of alienists and neuro-pathologists such as Despine, Morel, Maudsley, Krafft-Ebing on the one hand, by Lombroso's hypothesis as to atavistic relapses into savagery on the other; lastly by Liégeois' observations on hypnotic suggestions as a source of crime.[1] But these uncomfortable manifestations of the mysterious background of unconscious and subconscious influences lurking behind healthy and well-ordered life have been reduced to their true proportions,[2] and, while necessitating a revision of rough-and-ready methods of attributing criminal responsibility, they are entirely unlikely to subvert the fundamental notion of responsibility.

Kant's teaching.

Some conclusions are clearly apparent as the results of unprejudiced investigation. To begin with, it has been recognized that there was a substantial core of truth in older theories which have been superseded or modified in recent years. The idea of personal expiation, for instance, which lies at the root of religious conceptions of criminal retribution, has its full justification in cases when some strong moral influence brought to bear on the culprit or some powerful revulsion of feeling in his inner self has produced a craving for regeneration and atonement.[3]

The same idea lies at the bottom of Kant's much-decried

1 FERRI, *Criminal Sociology*, p 26; GAROFALO, *Criminology*, p xxx.
2 A most important contribution in this respect has been made by COLOJANNI.
3 TARDE, *op. cit.*, p. 42.

doctrine of retaliation. Just because moral life centred for Kant in the individual consciousness of duty, the only conception of punishment consistent with individual freedom was the idea of atonement as the natural consequence of crime.[1] The fatal objection to this unlimited idealism, as well as to the more vulgar forms of expiation practised by the Church, lies in the fact that while transgression and remorse are individual, punishment and purification come from the State or from the Church in the shape of external compulsion and external purification. Expiation and atonement have too often served as pretexts for suppression and traffic in indulgences. And yet modern penal reformers might do worse than take to heart this moral tendency of old theories and try their skill at the creation of real reformatories in which incipient and occasional criminals might have a chance of retrieving their false start in social life by atonement.

Social reaction.

Another train of thought suggested by former aspects of criminal law points to the decisive importance of *social reaction* against acts which injure the commonwealth either directly or in the person of its members. The feuds of former epochs as well as the wars of the present are states of conflict with enemies, and in a sense each criminal is an enemy threatening the safety of the commonwealth.[2] This broad ground of social defence is so incontestable that even the most extreme of those who plead for extenuating circumstances admit the necessity of adequate measures of self-preservation on the part of society, e.g., Ferri.[3] It is more interesting, however, to watch how the operation of this principle of social reaction is understood and traced by modern determinists who recognize that the world of criminal law has not been discovered as a new continent by the disciples of Lombroso and Ferri, but existed a long time before, although its maps may have been defective in important

[1] CAIRD, *Kant*, II, pp. 343, 377. The moral meaning of expiation has been brought home to all those who care to read by TOLSTOY'S *Resurrection* and by DOSTOIEVSKY'S *Crime and Punishment*.

[2] TARDE, *op. cit.*, p. 57: "The '*defensive reaction*' of a society is always the same thing at bottom, whether it be against an aggressor from within or one from without."

[3] *Sociologia criminale*.

respects. Garofalo, for instance, points to the moral sense of the community, as a complex of inherited feelings of sympathy and repulsion which the criminal finds arrayed against him in consequence of his act;[1] while Tarde rightly remarks that the feelings in question are themselves a consolidation of innumerable social experiences which settle down into habits and instincts. This growth of social ideas and habits, again, cannot be considered merely in contrast with the passions which have prompted the criminal to infringe the existing social rules; they are, in another sense, part and parcel of the consciousness of the criminal himself.[2] This suggests Tarde's own doctrine of responsibility as the outcome of a person's *identity* and the *similarity* of his mental attitude with that of the members of some social group. This doctrine, though somewhat scholastic in its wording, expresses the great truth that responsibility for crime rests on the attribution of a set of recognized rules to all reasonable members of a community. The exceptions derived from anomalies of the mind or from anomalous social situations serve to confirm the significance of the main principle. According to a leading German criminologist, Liszt, crime is the result of two factors—social influences and individual predisposition. It really comes to this, that as the reasonable individual ought to follow the direction of moral duty, society is reasonably bound to maintain and to enforce a certain number of positive rules which safeguard its existence. On the other hand, there is no necessity to keep up antiquated forms of compulsion and punishment when

1 GAROFALO, *op. cit.*, p. 102: "The existence of non-pathologic anomalies, and, among these, the absence of the moral sense, must be taken as established. . . . The expression 'moral insanity' is utterly indefensible. . . . When no derangement of the physiologic functions can be detected, the case is not one of disease, however great may be the incompatibility of the individual with the social environment." P. 104: "Criminal anomaly is therefore a deviation from the type of civilized man; in this it differs from disease, which is an anomaly in relation to the human species as a whole."

2 TARDE, *op cit.*, p. 107: "The malefactor who, after all, has breathed the social air since his birth . . . is bound logically, after having blamed such and such a criminal, to blame himself, in the commission of a crime of a similar nature."

their inadequacy and corrupting influence have been revealed by scientific inquiry.

Problems of the policy of punishment.

In this way the immense change brought about by the experimental study of criminals raises primarily problems of legislation as to penalties. Undoubtedly, the spread of crime in definite directions—say as regards property or in infringement of sexual morality—ought to claim the attention of students of social science as well as of legislators, but very few thinking men would endorse Ferri's projects of unlimited changes in law and civic intercourse.[1] Garofalo is certainly right in his criticism of these Utopian declamations, when he points out that it would be hardly practical to renounce the use of money in order to make forgery impossible, or to abolish marriage in order to put an end to bigamy. Reforms and even revolutions have to deal with the entire body of society and must take into account the whole complexity of social relations. Penal legislation deals with moral anomalies and must be directed towards the best means of restricting, if not suppressing them.

It is significant that some of the most thorough students of penal anthropology, like Garofalo and Calojanni, advocate measures of most stringent repression on the strength of the investigations of the experimental school. Garofalo is not only in favour of a frequent recourse to the death penalty for incorrigible criminals, but he recommends swift and harsh bodily punishment for impulsive and brutal criminals and elimination by deportation of recidivists and other corrupt subjects.[2] His theory may be regarded as a violent reaction against a sentimental leniency to which he ascribes the increase of crime in European society.[3]

Yet reformers are not more likely to commit themselves to a revival of systematic cruelty than to be carried away by a sympathy towards criminals, which would make honest citizens the victims of violent and lawless ruffians. While both extremes have to be shunned, the general trend of the new methods is becoming more and more clear every

[1] *Sociologia criminale*, pp. 215, 328.
[2] *Criminology*, pp. 191 ff.
[3] *Ibid.*, pp. 200 f.

day. As crime is recognized as a social anomaly, punishment is bound to take the shape of treatment rather than of retribution. *Treatment* is a term which reminds one both of medical cure and of the precautions against infection. Apart from the weeding out of cases that have to be dealt with in asylums and hospitals, responsible convicts must naturally be subjected to measures of isolation and discipline. The death penalty may still be necessary in extreme cases, but society must exercise special care in order that the awful power of putting an end to the life of its members may not be misused in application. In the vast majority of cases the most effective measures indicated by modern penology are (1) material reparation of the injury (indemnification), (2) disciplinary colonization, and (3) variation of penalties dependent on good behaviour. Of all methods of penalizing culprits the one most usual in our days, imprisonment, appears to be the most unsatisfactory.[1] There is nothing to recommend it but the ease of its application to large numbers of delinquents. It has been described by all competent observers as an active incitement to further wrong-doing, and it is to be hoped that the difficulties attending other methods will not prevent civilized countries from introducing and carrying out improved systems of .penalties. In any case, the fruitful development of the methods advocated by reformers is dependent on the recognition of one great principle—the idea of the *individualization of the penalty*.[2] This means that the punishment has to fit the moral case of the criminal as the drug has to fit the pathologic case of the sick man. No abstract equations will do: the judge stands to the criminal in the position of the doctor who selects his remedy after diagnosing the disease and the resources of the patient's organization.

Such a task is immensely difficult to fulfil; but is it not the blessing as well as the curse of the modern student that he is conscious of being confronted on all sides by tremen-

[1] F. LISZT, on Criminal Law, in P. HINNEBERG'S *Kultur der Gegenwart*.

[2] See SALEILLES, *De l'individualisation de la peine*, 2 éd, 1909. Cf. Prevention of Crime Act, 1908 (3 Edw. VII, c. 59, s. 1).

dous problems, instead of facing in happy ignorance obvious dangers and mistakes? It requires courage and self-denial to approach the problems of crime, but the problems of destitution, of education, of sexual relations are no less perplexing. In any case, we may envy the blind who do not notice them, but it is not proper for those who see to shut their eyes on purpose.

Psychological treatment of motives.

In general, the wider range obtained by modern psychology in considering mental movements and, more especially, the importance attached to emotions in explaining conduct, has naturally led to a different treatment of motives of action. Professor Petrazicki[1] of Petrograd argues that it would be wrong to suppose that all conduct is directed towards definite aims. In a great number of cases it is not the *aim,* but the *cause* of emotion which directs the appetite and the will. Altogether the "solution" of emotions assumes a leading part in the psychology of behaviour. Petrazicki draws a distinction between two currents of impulses essential to the explanation of morality and law. Purely selfish motives are certainly insufficient to explain morality; even the addition of sympathy does not suffice to explain the growth of ethical and legal systems. By the side of the two classes springing from egoism and sympathy he places the instinctive response to calls which are obeyed automatically as a result of habit and influence. In the case of legal rules the habit of obedience is usually accompanied by the recognition of obligations and the attribution of rights. The customs of submission on the part of subjects are matched by habits of command on the part of rulers. Whatever we may think of the share assigned to these various feelings and of their co-ordination, it cannot be denied that habit, custom and instinct of rule and submission do play a prominent part in the smooth working of institutions. We have recently witnessed cases when these bonds have snapped, and we are well able to judge how difficult it is to reconstitute authority and morality by means of appeals to reason or to physical compulsion.

[1] In his *Lectures on the Theory of Law and Morality* (Russian).

CHAPTER III

LAW AND SOCIAL SCIENCE

Individual psychology as a source of social life.

THE original domain of psychology is confined to the study of the individual mind in its conscious, subconscious and unconscious life. The methods of this study are introspective and may be supplemented by observation of self and of other individuals in their normal and abnormal state, and in various stages of development, as well as by experiments concerning mental phenomena, and comparison with animal life. It is obvious, however, that such a study, if centred entirely on individuals taken singly, would be incomplete and artificial. The essence of human personality has been correctly defined in the saying, that man is a social being. Hence scientific psychology is bound to extend towards a consideration of the effects of relations between men, while social science is bound to start with the elements of social intercourse ingrained in human nature.

A particularly energetic assertion of the claims of individual psychology in explaining the social process has been put forward by G. Tarde. In his view, social life has to be explained chiefly by "*intermentality*," by the intercourse between minds, and the most important of such processes is *imitation*.

The most obvious examples occur in the case of the communication of ideas by means of speech: it ensures the suggestion of ideas by one person to another, even if there are great differences in the respective surroundings of the two persons. It is needless to dwell on the results produced by conversation, by oratory, by lessons, by letters and books. Nor are we likely to minimize the effect of delivery, of temperamental warmth,[1] of examples of moral *infection* or

[1] TARDE, *Les lois de l'imitation* (2 éd., 1895), p. x: "To say that the distinctive character of every social relationship is the faculty of

prestige. In the case of hypnotic phenomena and of morbid suggestion, this process of *infection* reaches an extreme stage, but ordinary social intercourse is permeated with transfers of the same kind in various homely and attenuated forms. Indeed, no analysis of social life based on the consciousness of isolated individuals can be sound or productive of positive results. Social intercourse depends essentially on "intermental" cross currents of attraction and opposition, of suggestion and submission. Leaders exert their authority more through these mental [1] fluids than through direct command or by force. Followers do not only submit, but react in many ways, and the results of mutual adaptation produce a peculiar fusion of elements which cannot be treated as a heap of fragments, but as a manifestation of new life: just remember the synthesis of Saxon and French elements in English speech or the permeation of German law by the reception of Roman doctrines. Altogether this aspect of influence and imitation is quite as vital for legal development as the aspect of tradition or the aspect of modification by circumstances.

Tarde's brilliant synthesis culminates in the sentence, "society is imitation, and imitation is a kind of somnambulism." It is not difficult to discover the weak points of this theory, and they have been criticised with some asperity, for example, by Tarde's rival in France—Émile Durkheim. "Sometimes all that is not original invention has been called imitation. On this reckoning, it is clear that nearly all human acts are facts of imitation, for inventions properly so-called are very rare. But precisely be-

imitation, is to say that in my eyes there is no social relation, no social fact, no social cause other than imitation."

[1] TARDE, *op. cit.*, p. xi: "These social relations, thus various, gather themselves into two groups: on the one hand, people tend to transmit from man to man, by persuasion or by authority, a belief, and on the other hand a desire. It is precisely because human actions when imitated have this dogmatic or imperious character that imitation is a social bond, for it is dogma or power that binds men. Only part of this truth has been perceived, and it has not been clearly perceived, when it has been held that the characteristic of social bonds was constraint or force. This means ignoring the spontaneous elements in the credulity and docility of the masses of the people."

cause the word imitation comes to designate almost everything, it designates nothing definite." [1]

But certainly imitation, although not possessing the properties of a magic formula which will solve all social problems, undoubtedly plays a great part in the formation of social ties.

Social psychology.

In view of such undeniable influences, where can we place the dividing line between social science and psychology?

Societies of all kinds are composed of individuals, and have no independent existence as conscious beings in the same sense as individual persons are known to possess conscious existence. True, historians, philosophers and jurists have often spoken of the "soul of a nation," of the "self-consciousness of a people," and far-reaching conclusions have been drawn from such expressions. But, in common sense, it would be preposterous to attribute personal life to social bodies in the same way as to individuals. Society is constituted by a complex of relations and not by physical unity. Its consciousness is the collective result of social intercourse and the summing up of innumerable individual beliefs, desires and emotions.[2]

It would therefore be wrong to deny the importance of concentrating the investigation of the nature and conditions of such intercourse into a special department of scientific study. Such attempts have sometimes been made by psychologists, who have pleaded for an extension of their branch of study to social phenomena under the denomination of *national* or *social psychology*.[3] . .

[1] DURKHEIM, *Le suicide*, p. 114, note.

[2] PAUL, *Prinzipien der Sprachgeschichte*, p. 12: "It stands to reason that we cannot operate with the mind of the community and with elements of this mind of the community. The 'psychology of nations' can only consist in relations between individual minds produced by their reciprocal action."

[3] *Ibid.*, p. 7: "Cultural science is identical with social science. Society makes culture possible and makes man an historical being. A completely isolated human soul would certainly also have a history of its development, including relations to its body and its environment, but even the most gifted would only attain very primitive culture which would cease with death. Only through transmission of what an individual has gained to other individuals, and through co-operation of several individuals towards the same aims, can these narrow limits be extended. Not only economics, but every kind of culture, is based on the principle of division and co-operation

Exaggerations of the psychological treatment of social facts.

There are thus weighty reasons for an extension of the borderline between both departments, namely, as regards the influence of social factors modifying the instincts, habits and desires of individual man: such modifications have begun right from the time when the species *homo sapiens* detached itself from its original animal stock, and they are going on unceasingly in the process of recorded history. But this appropriation by the psychologists of a special set of questions on the borderland of both studies is after all only a matter of convenience and should certainly not lead to the absorption of sociology by psychology. And yet it is at such a rectification of frontiers that the more ambitious among the psychologists are aiming: they claim the right to subject social phenomena and relations to their own results and standards, and, for the purpose of such an annexation, they are ready to discard the most conspicuous features of psychological observation—introspection, and to extend the definition of psychology to the study of human behaviour in all its aspects. The consequences of such a shifting of ground cannot be said to justify the claims of the initiators of social psychology in this wide sense. Social creations, like language or religion, are approached with more valour than discretion, and instead of a critical examination of data and of careful inferences, we are treated either to sweeping assertions about instincts or to a restatement of facts gleaned from occasional linguistic, mythological or folklore studies.[1]

of labour. The particular study of cultural principles and the right it claims to co-ordination with other sciences, consists therefore in the investigation of the intercourse between individuals; it presents to us the relation of the one to the many, in 'give and take,' in influence and being influenced; it shows the younger generations entering into the inheritance of the older."

Cf. WUNDT, *Völkerpsychologie*, I, 1, pp. 16 ff.

[1] W. MACDOUGALL, *Introduction to Social Psychology* (8th ed., 1914), p. 3: "The department of psychology that is of primary importance for the Social Sciences is that which deals with the springs of human action, the impulses and motives that sustain mental and bodily activity and regulate conduct." P. 18: "Social psychology has to show how, given the nature, propensities, and capacities of the individual human mind, all the complex mental life of societies is shaped by them and in return reacts upon the course of their development and operation in the individual."

The heterogeneous aspect of the social process.

The fundamental misunderstanding at the root of this aggressive policy seems to consist in the fact that a sufficient distinction is not made between the elements of individual thought from which all spiritual relations spring, and the social synthesis which eventually results from the process of intercourse. Social formations set up standards of their own and require for their scientific study peculiar methods in keeping with the subject itself. Before one can speculate on the *psychological* factors of language, one has to study the conformation of existing languages and the laws of their development, and a linguist who would boldly derive the laws of phonetics from imitation, or the philological peculiarities of conjugation from inherited habits or feelings, would remind one of those writers on natural philosophy who deduced light and sound from the metaphysical properties of matter. One of the most famous exponents of national psychology, Wundt, did to a great extent realize the necessity of starting on a new track as regards social relations.[1] He insisted, at any rate, on the heterogeneity of social as contrasted with individual psychology. The "heterogeneity"[2] pointed out by him may

[1] *Völkerpsychologie*, I, p. 1: "*Völkerpsychologie* is based on the fact that society creates independent psychic values which are rooted in the mental characteristics of individuals, but are themselves of a specific kind and provide the individual life with its most important content."

[2] É. DURKHEIM, *Le suicide*, p. 359: "Either morality is derived from nothing which is given in the world of experience, or it is derived from society. . . . This is in no way astonishing for the student who has recognized the heterogeneous character of individual and social states. . . . Doubtless in proportion as we make only one in a group and in proportion as we live its life, we are open to their influence; but conversely, in so far as we have a personality distinct from its personality, we rebel against the group and try to escape. And every one leads this double existence at the same time; each of us is animated at the same instant by a double movement. We are bound by the social sense and we tend to follow the bent of our nature The rest of society therefore presses upon us to check our centrifugal tendencies, and we on our part concur in pressing upon some other individual to neutralize his."

Cf. the same, *Les règles de la méthode sociologique* (1895), p. 124: "Since the essential characteristics of sociological phenomena consist in the power which they have of exercising pressure from without upon individual consciousness, they are not derived from it, and thus sociology is not the corollary of psychology."

P. 127: "Society is not simply the sum of individuals, but the

be noticed in all sorts of natural processes. The sensation of "white" is not original, but is produced by the fusion of the various fundamental colours of the spectrum, and yet the sum of the blue, yellow, red and other component colours is not felt once the fusion has taken place, and "white" appears with its own distinctive features.[1] Again, water is quite distinct in its properties from the oxygen and hydrogen which go to the making of it. In the same way, social intercourse, though arising between individuals, develops on lines of its own and does not simply follow the promptings of individual psychology.

Sociology.

To sum up, social science moves in a department which, though intimately connected with psychology, nevertheless requires independent methods of observation and generalization.[2] If we turn to this particular field of social science, we have to ask ourselves, first of all, whether it can be treated as a connected whole and what kinds of investigation may be and have been co-ordinated under this generic term. It is hardly necessary to state that the conception of a social "science" analogous to natural science like physics, chemistry, biology, has been evolved within very recent times, chiefly by Comte and Spencer: on the whole, it may be said to have substantiated its right

system formed by their association presents a specific reality which has its own character."

[1] Cf. SIGWART, *Logik*, transl. by Dendy, III, p. 124.

[2] DURKHEIM, *Le suicide*, p. ix: "The sociological method which we follow rests entirely upon this fundamental principle, that social facts ought to be studied as things, that is to say, as realities outside the individual. There is no precept which has been more contested by our opponents, but there is none more fundamental. For, in short, in order that sociology may be possible, it is necessary before all that it should have an object and one which belongs to it alone. It must treat of a reality and one of which other sciences are not cognizant. But if there is nothing real outside particular consciences, it disappears through lack of matter proper to itself. The only objects to which observation can henceforward be applied are the mental states of the individual, since nothing else exists. Now these belong to the province of psychology. From this point of view, indeed, all that is substantial in marriage, for example, in the family or in religion, is the individual needs to which these institutions are held to respond: it is paternal affection, sexual appetite, what has been called the religious instinct, etc. As for the institutions themselves and their various and complex historical forms, they become negligible and of little interest."

to independent existence. The more special studies of social relations are older in order, however; it is enough to point to political economy, which can be traced a long way back to the physiocrats and Adam Smith; comparative religion and folklore was initiated by Vico; comparative politics and comparative law may even be said to start with Aristotle and to have been rejuvenated by Macchiavelli and Montesquieu. This precedence of the special branches has great significance in itself: it shows that it is in the field of such particular studies that original and fruitful investigations have been conducted before generalizations could be framed which allowed access to a higher plane of development, namely, to an attempt to construct a *sociology*, or general science of society. It may be added, perhaps, that even now the advance in the special branches is far more conspicuous and productive of greater results. This has been emphasized by one of the leading sociologists of our time, Émile Durkheim.[1]

In special studies on social subjects we have to do with new ideas applied to concrete facts which must be not only full of scientific significance, but in direct touch with realities. In the books devoted to general sociology we

1 É. DURKHEIM, *Le suicide*, p. v: "Unfortunately there is a good reason why sociology does not afford us this spectacle [of progress]; it is because in most cases it is not faced with definite problems It has not got beyond the period of construction by philosophic synthesis."

P. vi: "Books of pure sociology can scarcely be used by any one who makes it a rule to limit himself to definite questions, for the greater part of them are not included in any particular framework of research, and, moreover, they are too poor in documents of any authority."

Cf. *Règles de la méthode sociologique*, p. 96: "It seems as if social reality could only be the subject of an abstract vague philosophy or of purely descriptive monographs."

Even more pessimistic is the pronouncement of JELLINEK, *Allgemeine Staatslehre*, I, p. 90: "Sociology in the widest sense of the term embraces all manifestations of human society. This is the reason why sociological researches are without limitations of any kind; it takes away the possibility of a healthy, methodical progress directed towards attainable aims. The material of facts which modern Sociology proposes to take as a basis for its doctrines, is a screen which can only conceal for the ignorant the fact that aprioristic constructions founded on incomplete observation are lurking behind."

are often met by lifeless abstractions hardly disguised by artificial phraseology and scholastic disquisitions. Take, e.g., the definition of the subject in Simmel's work (*Soziologie*, pp. 7 f.): "It seems to me that the one and the whole possibility of creating a special study of Sociology is to detach ideas underlying contents from the forms which mutual influences in social life assume, and look at them as a whole from a scientific point of view. Social groups which are in substance as dissimilar as possible nevertheless manifest in their form identical influences of individuals on each other. Domination and submission, competition, imitation, division of labour, formation of parties, representation, consolidation—internal and external—etc., manifest themselves in political as well as in religious communities, in a band of conspirators as well as in trade-unions, in a school as well as in family-life."

For our purpose, however, namely for establishing the connection between social science and jurisprudence, it is not necessary to follow prolix variations on the theme of the contrast between matter and form, or to construct a theory of cultural science round the supreme conception of *unity*.[1]

The elaborate terminological exercises of De Roberty, the painstaking programmes of R. Worms and De Greef sometimes recall to one's mind Mephistopheles' instructions to the freshman: "When concepts fail, words may turn out of good avail." (*"Denn eben wo Begriffe fehlen, da stellt ein Wort zur rechten Zeit sich ein."*) The more or less paradoxical fancies of Lester Ward provide, perhaps, more interesting reading, but the thought which suggests itself forcibly in the perusal of this writer's volumes is that his excursions into all the sciences are the very reverse of careful scientific inquiry: why should such random disquisitions pretend to be contributions to a new science?

In truth, apart from the well-known achievements of the great pioneers of the study—A. Comte as to the classi-

[1] E.g. Stammler, *Wirtschaft und Recht*, p. 13; Natorp, *Soziale Pädagogik*, p. 37.

fication of sciences and Herbert Spencer as to the application of the principles of physical evolution to social life,[1]—the best contributions to general sociology have been obtained by applying purposely one-sided theories to the investigation of society.

I have already had occasion to speak of Tarde's doctrine of imitation; no less one-sided in its way is the treatment of the subject by Durkheim, who opposes social pressure and compulsion to Tarde's shibboleths of individual invention and imitation. Giddings rightly pleads for a combination of both elements. But Giddings' own theory of the "consciousness of Kind" is hardly free from the same taint. Surely social life in material and spiritual intercourse does not consist exclusively of the conflicts and cross-influences of socially conscious groups—neither economic intercourse, nor religion nor science, nor literature could be explained on these lines. However, such arguments have had their value as throwing a strong light on one or another feature of the subject; and by combining the various explanations, we may not only find that they supplement one another, but even sometimes that they result in mutual corroboration. For example, Durkheim's study on the Division of Labour[2] may serve as an introduction to Giddings' teaching as to consciousness of kind, while, on the other hand, Durkheim's monograph on elementary forms of religious life[3] presents, in a way, the systematic culmination to studies of group

[1] For a good summing up of their main results, see BARTH, *Die philosophie der Geschichte als Soziologie*, I, and GIDDINGS, *Principles of Sociology*. Two principles formulated by Comte and Spencer are especially worth attention: see BARTH, *op. cit.*, p. 34: "Evolution in the intellectual sphere moves side by side with that in the social sphere. Although the intellectual is by nature weaker than our 'affective capacities' (IV, pp. 387, 388; V, p. 28): although it so greatly needs the incentive supplied by the appetites, the passions, and the feelings; and although it exists in order to modify rather than to dominate (*pour modérer, non pour commander*, V, p. 170; cf. V, pp. 219, 229): yet it is the leader, and the other activities of the mind are subject to it. '*Réorganiser d'abord les opinions, pour passer aux moeurs, et finalement, aux institutions*' (VI, p. 521). (The object is, first to organize opinions, then customs, and finally, institutions.)"

[2] *La division du travail* (1902). SPENCER develops a theory of natural right of freedom—*Social Statics*, 94 f., *Man versus the State* (ed. 1886), p. 84 ff.

[3] *The Elementary Forms of the Religious Life*, trans. by J. W. Swain.

psychology. Indeed Giddings has attempted to justify the extremely one-sided character of such studies in general sociology by the requirements of scientific monism, the necessity of co-ordinating all parts of the scientific inquiry round one guiding principle. Undoubtedly such monotony of treatment helps to make an inquiry clear and coherent: it is a pity, however, that in subjects like sociology there is such a variety of elements and such a wealth of possible combinations that the reduction to unity of principle is almost certain to subject the facts to a kind of Procrustean mutilation. Durkheim's work is especially characteristic in this respect: it is remarkable for incisive and suggestive thought, steeped in extensive learning and presented to readers with great skill of exposition. But one feels all along the pressure of a heavy dogmatism, and on every page plain truths are manipulated in an artificial manner for the sake of theoretical coherence. However much we may concede to analytical investigation, the subject of "Sociology" at large is synthetical in its very essence, and some means must be found to do justice to this characteristic peculiarity.

Statistics.

A necessary supplement and correction of abstract sociology is presented by statistical investigation. The best means of estimating the impression produced by a scientific treatment of numbers in the study of social life is to turn to the work and outlook of the first pioneers of statistical observations, for instance Quételet. He remarks in his *Physique sociale* (1869) on the heights of French conscripts recognized as proper for military service: "By means of the known groups, it has been possible to calculate *a priori* those not included. I have thus been led to the opinion that a notable fraud has been perpetrated in rejecting men for defect of height, a fraud which I have been able to illustrate by a table."

The remarkable regularity observed from year to year in the number of such apparently disconnected cases as the posting of letters without address [1] or the number of

[1] BUCKLE, *History of Civilization in England* ("The World's Classics"), I, pp. 24, 27.

suicides, suggested to Quételet and to his disciples the view that individuals in society become grouped round certain central or average types (Quételet's *homme moyen*) whose inclinations and character produce the results registered in the statistical tables. This explanation had to be modified in the course of subsequent researches. Knapp, for instance, arrived at the following conclusion: "The observation that the number of acts of the same kind within the limits of a given district is subject to such slight variations from year to year, finds its explanation in the fact that men are very much alike both as regards the motives by which they are actuated and also as to the circumstances of their environment from which motives are mainly derived."[1]

The fundamental fact remains that all forms of social activity create results which, when amenable to enumeration, present an incontestable regularity and persistency. As Sir R. Giffen has expressed it (*Statistics,* p. 3): "It seems to be quite unnecessary to debate whether the whole field of statistics thus dealt with or a portion of it can be treated as a distinct science. There are people who think that the study of man in societies by means of mass observation is entitled to rank as a distinct and separate science; which they call Demography. Others vehemently dispute the claim thus put forward, maintaining that the method of statistics is useful to many sciences, and especially to sociology, but that there is no separate science entitled to the name. I confess that controversies like this, purely verbal, as it seems to me, are to my mind devoid of interest. It is not disputed that there are great masses of sociological facts which must be treated and handled by statistical methods, and that there is a group of scientific facts in consequence which can only be appreciated by those who follow such methods. Hardly anything can turn upon the question whether we give the name of a distinct science to such groups of facts, or not."

In a general way it is certain that the statistical method has become indispensable to social studies and that it may

[1] *Jahrbücher für Nationalökonomie und Statistik,* XVI (1871), 245 ff.

be used both for descriptive purposes in order to characterize a situation or a course of development, and for analytical purposes in order to ascertain the working of certain factors, when the fluctuations in their working can be subjected to definite observation.

History.

Another department of knowledge intimately connected with sociology is the study of *History*. It presents, as it were, the highroad to general sociology, in as much as it is directed primarily to establishing the facts of social development.[1] In the terminology of Spencer's school it is the necessary introduction to *social dynamics*. History, however, had existed for ages before *sociology* in the modern sense was thought of. Historical aims and methods have been mapped out independently of any direct connection with social laws or any substitutes for them. Let us notice to what conclusions the historians themselves have come in respect of these aims and methods.

Natural science has been contrasted by modern thinkers[2] with cultural science based on history. The aim of natural science is to discover laws, that is, abstract principles to which the actual facts may be subordinated without residuum. The aim of cultural science is to ascertain what is important in the concrete and the individual.[3] The standard in this case is not the standard of recurrence, but the standard of *value*. The course of history is said to be the struggle for cultural values in economics, politics, literature, art and religion. The Renaissance or the sway of Napoleon are great events in themselves, quite apart from their place in the scheme of social evolution. The stress falls on individualization as against generalization. How is such a

[1] BARTH, *Philosophie der Geschichte als Soziologie*, I.

[2] WINDELBAND, *Naturwissenschaft und Geisteswissenschaft Begriffsbildung;* H. RIKKERT, *Die Grenzen der Naturwissenschaftlichen Erkenntniss;* the same, *Naturwissenschaft und Kulturwissenschaft*.

[3] In the view of RIKKERT, an historical event cannot be isolated from its circumstances, none of which will ever recur. Cf. GEO. TREVELYAN, *Clio* (1913), pp. 7, 12, 15: "The deeds themselves are more interesting than their causes and effects and are fortunately ascertainable with much greater precision. It is possible that when Professor Seely said: 'Break the drowsy spell of narrative Ask yourself questions, set yourself problems,' he may have been serving his generation. But it is time now for a swing of the pendulum."

view to meet the following simple question: granted that history has to deal with individual states and events, can it try and does it try to assign *causes* to these states and events? And how can one assign causes to effects without instituting express or concealed comparisons with similar though not identical combinations,—without analysis and generalization? The force of these queries cannot be disregarded, and the chief exponent of the above-mentioned view, Professor Rikkert, cannot help reintroducing the element of generality in this connection after expelling it from the domain of concrete history. It cannot be said, however, that he has found a right place for it, and writers who stand very close to him in other respects, for example Edward Meyer and Hermann Paul, make allowance for the generalizing tendency as well as for the individualizing one.

An apt and incontrovertible illustration of the necessity of reckoning with scientific generalization as well as with artistic individualization in historical processes is presented by the history of language.

Considered as a store of words and phrases serving the purpose of expressing various meanings, language is undoubtedly a product of innumerable acts of invention. In its phonetic aspect, as a combination of sounds and in its grammatical framework of forms and syntactic rules, it is amenable to generalization and to scientific treatment. And is the case so entirely different in folklore, in myth, in religious beliefs, in morals, in economic arrangements, in political institutions? A common-sense summing up of the position may be taken from Giddings' syllabus of *Inductive Sociology*.[1]

Synthetic and analytical functions of history.

Yet the attacks of the literary and cultural school are not without a substratum of truth. They bring out strongly one fundamental peculiarity of historical thought. It is primarily *synthetic* in character: so far as it deals

[1] *Op. cit.*, p. 8: "The historian has seldom attempted to dissociate the constant elements in history from the unique, the individual, the personal. On the contrary, he very properly has tried to grasp history in its concrete entirety and, in recording the life of any people or age, to make clear the vital connection between those things that are universal and those that are peculiar or distinguishing."

with social realities it has to treat of complex states and complex processes, and its main object is to estimate and reflect the peculiar concentration of various elements in the shape of individuals, nations, events. In any case it must pave the way for such estimates by a careful examination of evidence. And as for the final reconstruction, it will depend both on reflective comparison and deduction, and on artistic intuition.

This synthetic outlook of history gives it a peculiar value in combination with other studies. It enlarges the field of personality from individual life to that of social bodies—political, national, religious, literary, scientific. History opens a unique vista of *synthetic* treatment. In a sense, it may be regarded as the complement of general sociology, because it strives to represent the intimate connection between the different sides of social life; it appears in this way as a continuous illustration of the interdependence of different factors which constitute Society as distinct from the State or any other human group.

There is another side of historical knowledge that seems no less important. Leslie Stephen has remarked[1] that the aversion of the Utilitarians for history has vitiated their whole system, because it has deprived the school of empirical philosophy of the main material of social experience, namely, the data of past development.

There is profound truth in this remark. It would be a sad matter if we were debarred from using historical experience in forming judgments on the problems of social science and politics which surround us. I do not suppose any one is likely nowadays to question the immense political value of such a work as Tocqueville's *Ancien régime.* Indeed when, under passing influences, historical data have been disregarded for a time, as, e.g., in economics, the omission has had a damaging effect on the whole trend of the inquiry. In this sense it may be said that history, besides being a department of synthetic knowledge by itself, takes a place as a method in the development of all branches of social science in their analytical work.

[1] *The English Utilitarians,* I, pp. 297-301.

Classification of social studies.

From our point of view, the departments of social studies may be classified into five principal groups: (1) anthropology, (2) the study of cultural intercourse, (3) economics, (4) politics and (5) jurisprudence. The first group would comprise: (*a*) geography in its anthropological aspect, the study initiated by K. Ritter and by Ratzel (anthropogeography), (*b*) ethnography, as a review of racial and tribal divisions, and (*c*) physical and social anthropology and prehistoric archæology. The latter finds its principal place in this first group because its scientific treatment is dependent on its intimate connection with natural sciences, —especially with comparative anatomy and geology—but it is obvious that it presents at the same time connecting links with the treatment of origins in the four other groups.

The section of cultural intercourse embraces comparative philology, religion and philosophy, literature, art and folklore in general. The place of the other sections in such a classification is sufficiently indicated by their names. Now, undoubtedly both primitive institutions and cultural studies, e.g., the study of religion, have a bearing on the development of law: let us only think for a moment of Brahmanic and Mohammedan jurisprudence. Yet we may leave the discussion of cross-currents in these to the treatment of particular problems. It is different with economics and political science. These branches of social science are so closely allied to law that it is necessary to ascertain from the start in what way they react on jurisprudence and how the lines of demarcation between their respective domains have to be drawn.

Political economy

The position of political economy requires special attention in many ways. The study has reached a high scientific level and, in spite of many controversies and doubtful points, presents the best proof of the possibility of bringing social phenomena within the scope of exact analysis and of generalizing reflection. Such results have been achieved primarily through the isolation of one set of facts and their analytical arrangement under the sway of one simple motive—the striving towards the acquisition of material goods.

This fictitious simplification enabled the classical school to build up, with the help of deduction, a coherent and comprehensive doctrine; the dialectical analysis of economic concepts such as value, price, capital, wages, rent, has been used as the chief method of economic investigation. No doubt, it has yielded rather incomplete results: in actual life the motives of economic action are far more complicated —education, customary standards of welfare, social ideals, and feelings, religious impulses, etc., have exerted and are exerting their influence on production, distribution and exchange. Even within the special range of economic enterprise, it would be quite wrong to reason on the assumption of purely mechanical processes of competition and co-operation between individuals supposed to be equal one to another in quality, in will power, in character, in aims. And yet such a reduction of economic society to a collection of uniform atoms, led by the same forces to similar aims, has formed the basis of political economy as understood and taught by the classical school. It has found its most remarkable exponent in Ricardo, a thorough intellectualist and utilitarian, who set the stamp of his mechanical doctrines on the English and continental economics of the first half of the nineteenth century.

The famous disquisitions on rent, wages and prices are certainly tainted by mechanical atomism.[1] Yet, it must be said emphatically of these thinkers that once you grant their premises you are bound to follow them to their conclusions, and it cannot be doubted that the work of Adam Smith, Ricardo, Malthus, J. S. Mill has advanced the cause of social science more than any other line of study. As, after all, the desire of acquisition and profit does act as one of the principal elements in economic life, the analysis of its working is bound to explain a great deal in the phenomena of production, distribution and exchange.[2] The

[1] SCHUMPETER, *Literary Survey* in the *Grundriss der Sozialökonomik* (1914). *Epochen der Dogmen- und Methoden-geschichte*, I, p. 65. Cf. E. CANNAN, *Theories of Production and Distribution*.

[2] A. MARSHALL, *Principles of Economics* (6th ed., 1910), p. 27: "They deal with a man, who is largely influenced by egoistic motives in his business life. Being concerned chiefly with those aspects of

peculiar combination of deductive reasoning and empirical observation has made it possible to evolve a system adequate to explain real facts from the point of view of a most important period—that dominated by individualistic liberalism.

Improved methods.

Vital defects were perceived by those who revolted against the intellectualism and the selfishness of this economic movement. Not only reactionaries and romantics, but all those who believed mainly in intuition, imagination, organic and unconscious or half-unconscious development, criticized the narrow-mindedness and barrenness of the classical school of political economy. Carlyle in England, A. Comte and Le Play in France set themselves to prove that the life of society even in its economic expressions depends on many feelings and tendencies which have nothing to do with personal greed and, in fact, that it is impossible to build up a society by the action of selfish motives. In political economy itself the standpoint of organic growth was represented by Roscher and that of the "heterogeneity" of elements by Knies,[1] while Schmoller's school became a centre of historical research opposed to the dialectical and speculative methods of classical economists. In spite of many compromises and much overlapping, the students in this department grouped themselves in a characteristic way round the two poles of abstract doctrine and concrete observation as to development.[2] It is important to note that modern progress in this field has not removed this polarization, but rather accentuated it. Jevons and the so-called Austrian and American schools have shifted the group of discussion and introduced new principles: instead of concentrating on the problems of value in exchange, they have placed in the foreground the problems of value in use and of supply and demand.[3] Yet

life in which the action of motive is so regular that it can be predicted, and the estimate of motor forces can be verified by results, they have established their work on a scientific basis."

[1] Cf. MAX WEBER, *Roscher und Knies* in *Schmoller's Jahrbücher für Gesetzgebung, Verwaltung und Volkswirtschaft*, vol. xxvii ff.

[2] SCHUMPETER, *op. cit.*, pp. 55, 62, 99.

[3] JEVONS, *Theory of Political Economy* (3rd ed., 1888), p. xxxii. A. MARSHALL, *op. cit.*, p. 93: "Law of *satiable wants or of diminish-*

the analytical method is still used in contrast with the historical as the natural weapon of economic theory. Nothing could be more explicit than the statement of one of the leaders of the new school, F. von Wieser.[1] "The consciousness of man in his economic capacity presents a stage of experience possessed by every one who does business in ordinary life, and the theorist finds it ready for use in his own self without having to resort to special means for collecting it. The theory of national economy goes as far as, and no further than, common experience. The theorist's task ends with the general experience. But where science has to collect evidence in the way of historical or statistical work, or by any similar accepted method, it must leave studies of this nature to those working in other departments of economic science, who are able by means of their method to throw further light upon the results of their researches. He will, however, not be able to get away from the relation with historical development. There are numerous historical economic processes which, after having filled decades and centuries, are still unsettled, and which become clearer in the light of common experience. Among these must be reckoned the development of the division of labour, or the accumulation of capital, or the raising of ground rents or even the superseding of natural husbandry by cash-nexus." There is undoubtedly a great deal of truth in this frank recognition of the merits of an analytical isolation of the elements of social life and of their study in the concentrated light of typical idealization. The combination between such dialectical treatment and the study of concrete facts supplied by history and statistics remains, however, a vague "desideratum" and it is evident that further progress must depend on the bridging over of this gulf.

ing utility: the total utility of a thing to any one increases with every increase in his stock of it, but not as fast as his stock increases. The part of the thing which he is only just induced to purchase may be called his *marginal purchase*. The utility of his marginal purchase may be called the marginal utility."

[1] *Theorie der Gesellschaftlichen Wirtschaft* in the *Grundriss der Sozialökonomik*, I), p. 133.

Economic materialism.

A daring and interesting attempt has been made to solve this fundamental difficulty. Karl Marx and his school have not been content with appropriating the results of Ricardo's teaching on value and wages in order to show that it involves a profound social antagonism. They claim to have established a direct connection between dialectical theory and historical development by help of the formula of "economic materialism."

According to this theory the phenomena of spiritual life in the history of mankind are nothing but reflected images of economic conditions. Only the latter are the true realities of social life. "It is a mistake"—asserts the materialistic conception of history—"to regard ideas as independent entities and as existing by their own weight." The social materialist compares ideas to the rainbow which is not a substantial phenomenon, but a reflection, attributable to the passage of light through a certain *milieu*. You may investigate the appearance and significance of social conceptions and observe the birth and decline of ideas and their influence on history: but you must clearly realize that these observations do not represent the true objects or the laws underlying historical movements.

While you believe yourself to have got hold of ideas, you are only speaking of images, not of the real objects of which those ideas are the reflection.[1]

This is how, for instance, Engels explains the rise of Calvinism.

"Calvin's creed was one fit for the boldest *bourgeoisie* of his time. His predestination doctrine was the religious expression of the fact that in the commercial world of competition success or failure does not depend upon a man's activity or cleverness, but upon circumstances uncontrollable by him. It is not of him that willeth or of him that runneth, but of the mercy of unknown superior powers; and this was especially true at a period of economic revolution, when all old commercial routes and centres were replaced by new ones, when India and America were opened

[1] R. Stammler, *Wirtschaft und Recht*, p. 33.

to the world, and when even the most sacred economic articles of faith—the value of gold and silver—began to totter and to break down."[1]

"Recognizing the futility of his attempts to conquer matter by his own labour, the human being is wont to regard nature's resistance in the light of a hostile force, as the emanation of a will superior to his own which by prayers and offerings he seeks to render propitious. . . . It is therefore in no wise strange that the religious sentiment is thus developed as the psychological product of isolated and co-actively associated labour."[2]

We are confronted with an attempt to unite economic analysis and the concrete process of history into one comprehensive scheme, which, once recognized, cannot remain a mere piece of learning, but ought to serve as a direction and an incitement to practical action. To those who are drawn by the attraction of a coming change the formula of historical materialism appears a tempting pronouncement. If, however, we do not surrender to the *vertige* of a popular cataclysm, but inquire fearlessly into the symptoms of truth, the "dynamic" formula of the Marxists discloses both positive and negative features. On the positive side must be set the fact that in its treatment of history it leads to some extent to the same kind of useful isolation which modern theory has assigned to the analytical method in economics. It considers the life of humanity from a single point of view—that of the production and distribution of the means of existence; and by doing so it undoubtedly throws a strong light on the importance and influence of the economic factor in the process of evolution. And as the "means of existence" is, after all, the most general and the simplest requirement of life, the dialectical work performed by the materialists in this respect has had a far-reaching influence even apart from their peculiar aims. The negative side is no less obvious to all unprejudiced observers. By wilfully curtailing our range of view, by

[1] *Socialism: Utopian and Scientific*, p xxi

[2] A. Loria, *The Economic Foundations of Society* (1907), (transl. by L. M. Keasbey), pp. 22.

following one train of thought and treating all other interests—political, religious, artistic, scientific, philosophical —as mere adjuncts and reflexes, the Marxists expose themselves to the certainty of miscalculation and misinterpretation.

Materialism and law.

In one respect such miscalculation is especially dangerous, both from a scientific and from a practical point of view— I mean the destruction of the domain of law by the Marxists under the pretext that law is merely a reflex manifestation of the preponderance of one or the other economic class. We shall often have to come back to the close connection between economics and law in the life of societies, but it is advisable to enter a protest from the very beginning against the one-sided explanation tendered by Marx's school. One or two elementary observations may help to show how little it corresponds to historical reality. The *régime* of slavery in ancient society and in the New World was not simply the result of economic factors, but a combination of economic exploitation with moral and political views which had a development of their own and crystallized in a definite body of law. It gave way before movements of mind which again could not be attributed exclusively to material considerations, but also to a change of opinion as to human nature, the State, the duties towards fellow-men, etc. These various currents of thought combined to produce the legal changes which transformed opinions and sentiments into rules of conduct. Or take the movement towards protection and development of national industries so conspicuous in recent times: it is evident that its motives are not suggested simply by the interests of certain influential groups and persons, but produced to a large extent by the intensified consciousness of national unity as against outside interests, although the free play of these interests may be profitable to individual citizens as consumers. Altogether, legal rules, by which all social intercourse is framed and contained, cannot be treated as mere corollaries of economic stages. Machinery, organization, co-operation have their own requirements, and to simplify the action of the social process by reducing the po-

litical and legal factor to the rôle of mere consequences of class struggle would be about the same as eliminating one of the factors in accounting for a process of multiplication. *Five* is as material an element in the formation of *thirty-five* as is *seven*.

Idealism in social movement.

In a sense it is strange that the campaign against idealism should be carried on so strenuously by representatives of the socialist movement, which, after all, entirely depends on the spread of self-consciousness and on the propaganda of political ideas among the labouring classes.[1] As far as numbers are concerned, these classes have always been preponderant, and yet the huge majorities of slaves or serfs never had a chance against their masters until the advance of political thought taught them to formulate their claims and to organize; while, on the other hand, within the classes superior to them in education and experience, theories favourable to the recognition of the claims of labour have been initiated and developed from moral sources—in connection with ideals of justice and political reconstruction.

The error of materialistic fatalism does not merely falsify the historical and scientific theory of the Marxists. It threatens the policy of practical socialism with a reduction to absurdity. If the life of organic evolution tends to war and to the levelling of society on the standard of the lower classes, it is obvious that it will lead to degradation in all respects and that all complex tasks requiring skilful handling will suffer in the process. Problems of engineering, of medicine, of law, of economics cannot be solved by mere appeals to communism. You do

[1] Cf B. KIDD, *Social Evolution* (1894), p. 218: "If we are to have nothing but materialistic selfishness on the one side leagued against equally materialistic selfishness on the other, then the property-holding classes being still immeasurably the stronger, would be quite capable of taking care of themselves, and would indeed be very foolish, if they did not do so. Instead of enfranchising, educating or raising the lower classes of the people (as they are now doing, as the result of a development which Marx has not taken into account), they would know perfectly well, as they have always done in the past, how 'to keep the people in their places,' i.e., in ignorance and political disability.

not build a railway bridge by the light of Marxist doctrine. We have lived to witness the blessings of the rule of workmen who do not work and of soldiers who do not fight in a great country confronted with every kind of difficulty and danger. Let us hope, at any rate, that the catastrophe of the Soviets may serve as an object lesson to illustrate the truth that it is not by discouraging education, industry and credit in favour of moral license, violence and corruption that the Socialists can hope to regenerate the world. If they want a serious trial for their views, they ought, like every other great movement of opinion, to strive for a commanding position in the domain of thought, and to justify the preponderance of the working class by its educational achievements.

CHAPTER IV

LAW AND POLITICAL THEORY

The State and Law.

We have now to consider another aspect of social studies, namely, political science, in the sense of a survey of institutions and of doctrines concerning public life. It is obvious that we tread here on ground which is indissolubly connected with the operation of law. It is not the particular problems of constitutional law, legislation, judicial organization, state interference in private affairs, that we need discuss now, as all these matters will appear automatically in their proper places when the legal material comes to be examined in detail. The first question to be answered at this juncture concerns the relation between State and Law: are their functions combined, and in what respect have they to be treated separately and in contrast to each other?

I may start with an explicit affirmation as to their interdependence. It is impossible to think of law without some political organization to support it; nor is it possible to think of a State without law. The first alternative is absurd, because law requires for its existence and application an organization to put it into force. The action of such an organization may be limited to recognizing and supporting rules framed by other agencies, say by priests, or by jurisconsults, or by experts in commerce or in folklore; in other cases the political element will be contributed by agreement between independent states. We may, again, have to deal with more or less autonomous associations subordinated or co-ordinated to the State, e.g., with churches or with local bodies, exercising authority over their members for the purpose of carrying out specific functions. All these cases, however, resolve themselves into varieties of the ordinary and fundamental position in which

social order is maintained by laws enforced in the last resort by political unions. Although from a wider aspect the function of law may be attributed to all forms of social organization, it cannot exist anywhere without leaning directly or indirectly on some kind of political union acting as a safeguard of social order. In this sense law requires the State as a condition of its existence.[1]

On the other hand, neither the State, nor any other political or quasi-political body, can exist apart from Law, in the sense of a set of rules directing the relations and conduct of their members. The individuals who appear in the last resort as the component elements of these political bodies are not welded together by physical forces, and have therefore to be united by psychical ties ranging from occasional agreement to more or less permanent rules of conduct; and in the case of any society organized as a political union these ties are bound to take the shape of laws, customary or enacted, complete or imperfect, but all tending to establish order and to apportion rights and duties. When, as in the case of international law, the basis of the machinery rests on agreement, the whole structure is undoubtedly imperfect and shaky, but theoretically it is intended to embody rules recognized by the States as members of the international world, and therefore, in spite of flagrant breaches of faith and trust, it has a standing claim to support and enforcement by the common action of the political bodies which have taken part in its formulation. In short, law and the State are to that extent interdependent that it would be idle to derive one from the other. From this point of view the State may be defined as a juridically organized nation or a nation organized for action under legal rules.[2]

Marxists are apt to speculate on a complete disappearance of State and Law. Engels, for instance, thinks that "as soon as there is no longer any social class to be held in subjection, as soon as class rule and the individual

1 GIERKE, *Johannes Althusius*.
2 GIERKE, *Grundbegriffe des Staats* in the *Zeitschrift für gesammte Staatswissenschaft*, XXX, p. 160.

struggle for existence based upon our present anarchy in production, with the collisions and excesses arising from these, are removed, *nothing more remains to be repressed,* and a special repressive force, the State, is no longer necessary."[1] Is this scientific or Utopian? More practical Socialists do not share these illusions. According to Sidney Webb, "The necessity of the constant growth and development of the social organism has become axiomatic."[2]

Might and Right.

The necessary alliance between State and Law becomes even more apparent when one examines each of these conceptions in itself. As regards the nature of the State, three principal views have been formulated by political thinkers: it may either be considered as the embodiment of power, or as an organic growth, or as a juridical arrangement. I may say at once that there are elements of truth in each of these interpretations, although the share to be assigned to each is bound to vary in accordance with the epoch and the country. Any political organization, in so far as it has to appeal to power for its maintenance, can be considered as the resultant of forces seeking to obtain sway in the community: when, for some reason, the interests represented by these forces cannot be adjusted or reconciled, conflict may assume an acute form and lead to open and

[1] ENGELS, *Socialism: Scientific and Utopian*, p. 76. Cf. ACHILLE LORIA, *The Economic Foundations of Society* (1907), p. 16: "In order to prove that the ethics of love will be spontaneously established within the final society, it is not necessary to suppose with Bellamy and other Socialists, that egoism will cease to be active under this final economic *régime*, and that each will take pleasure in working for others. This would only be admissible under the supposition that the final society would succeed in changing human nature—a thing at least very problematic. . . . We have simply to take account of the fact that, within an economy where equality prevails, especially if it be associative in character, respect for the well-being of another is in conformity with the egoism of the individual, because every injury and every benefit accorded to others reacts inevitably to the disadvantage or advantage of the agent himself."

[2] *Socialism in England* (1890), p. 5: "The point of view expressed in the text explains the following protest against criticism by individualistic Liberals: When the higher freedom of corporate life is in question, they become angrily reactionary, and denounce and obstruct the most obvious developments of common action, as 'infringements of individual liberty, municipal trading,' or, dreadest of all words—'bureaucracy.'"

violent struggles in which the sovereignty in the State constitutes the spoils of victory. I need hardly recall the cynical conclusions drawn from such observations by Sophists or their pupils (e.g., Plato's Thrasymachus or Callicles), or by modern worshippers of brute force like Gumplovicz.[1]

It is more important to notice that a modification of the doctrine makes it more acceptable as an explanation of actual facts. The most famous advocate of the absolute State, Hobbes, derived it not from an assertion of brute force, but from the recognition of a sovereign umpire by selfish individuals. The notion of a contract of subjection is out of date, but the idea of the suppression of strife by a sovereign umpire is reasonable and based on experience. Let us go one step further and notice that the state of equilibrium obtained by this suppression of strife is the normal state of human communities. Of course, the enforced peace by which such equilibrium is conditioned does not prevent competition and conflict in regularized forms between individuals and social groups within the State, and therefore the equilibrium obtained cannot be described as a stable one, but rather as a series of oscillations round a common centre. Nevertheless the notions of peace and order that pervade this normal arrangement are inseparable from ideas of compromise and adjustment. The rule of the strong when it ceases to be a conquest or a revolution, is bound to settle down normally into a rule of law.[2]

The State an organism.

Another way of considering the State is to lay stress on its continuity, its historical development, the vital connection between its aims and its functions, the slow and partly unconscious growth of its tissue and organs. These

[1] *Der Rassenkampf*, 1883.

[2] MERKEL, *Juristische Encyclopädie:* (par. 35) "The ascertaining and safeguarding of spheres of power does not take place for the sake of justice, but the aim in this regard is only achieved through justice. The reason is to be found in the mischief of the struggle . . .; but a lasting check on this mischief can only be an order that assigns to every one what is due to him according to accepted views."

(par. 40) "The contents of the law are generally in the nature of a compromise that has to be modified and revised in connection with changes of social circumstances."

features have sometimes suggested elaborate comparisons with biological organisms.[1]

But even apart from such analogies, the habit of approaching political problems as manifestations of quasi-organic processes has had a profound influence on the thoughts and actions of statesmen and citizens. In Burke and Wordsworth, for instance, this estimate of the sensitiveness and organic transmission of social life produced a violent reaction against the reckless manner in which the revolutionists were dissecting and resettling living nations.[2] Law comes in for its share in schemes of such organic interpretation, in as much as its evolution could be shown to depend on profound peculiarities of national outlook and temper and is not amenable to sudden and arbitrary changes.

In this way, though the first of the above-mentioned theories lays stress in an exaggerated manner on the catastrophes in the formation of States, while the other dwells on the superindividual life of national units, both views tend towards the establishment of a legal frame for society: the formation of a system of rules and rights appears in any case as one of the characteristic manifestations of the process of government.

Is the State a Corporation?

Naturally, therefore, political doctrine has tried to express in juridical formulæ the nature of the State as a special kind of society. We need not concern ourselves with attempts to represent the State as the agent of a theocracy or as the object of princely sway. Two other solutions deserve greater attention. According to one the State is a variety of the juridical concept of corporate life.[3]

It is pointed out that the essence of a State organization

[1] SCHÄFFLE, *Bau und Leben des socialen Körpers*.

[2] BURKE, *Reflections on the Revolution in France*, p. 31 (Everyman's Library). "Have not politics founded upon hereditary descent the merit of being 'the happy effect of following nature, which is wisdom without reflection, and above it'?"

[3] JELLINEK, *Allgemeine Staatslehre*, pp. 162 ff., 581.

lies in the fact that its existence surpasses the existence and interests of its individual members while forming at the same time a most important element in the life of each one of them.

As Aristotle said long ago, man is a "social animal." It is impossible for him to live an isolated life: he is bound to associate with his fellow-men. All associations created by individuals—the family, the local group, etc.,—tend ultimately toward a self-sufficient union called the Commonwealth or State. Government and law give expression to the corporate will and mediate between the corporation and its members. It is out of the question for us to dwell on the differences between various exponents of the doctrine under discussion, especially as to the contrast between those who regard the corporation as an artificial or fictitious device for systematizing a complex of legal rules, and those who impart to corporations in general and to the State in particular the attribute of "reality."[1]

It may be sufficient to note that the conception of the State as a subject of right may sometimes lead to mystic views which it would be difficult to reconcile with individual "self-determination" or freedom. It is not, however, such extreme forms of the theory that interest us at present, but the general idea that in analysing the notion of the State we ought to apply to it the juridical attributes of the corporation and of the subject of rights. Undoubtedly such a subsumption of the species "State" under the genus "Corporation" is helpful and suggestive in many ways.

Even in its moderate forms it meets, however, the resolute opposition of a group of thinkers who contend that the key to any reading of political theory has to be sought in the fundamental fact of human life—in individual personality.

[1] GIERKE, *Das Wesen der menschlichen Verbände* (1902), pp. 17, 21, 22. THALLER, GÉNY and others, *L'œuvre juridique de R. Saleilles*, p. 330: "The conception of reality appears to us as the only conception admitted by the juridical consciousness of the masses, and interpreted by learned men, jurists and doctors Everywhere the capacity and personality of collective, organized groups is seen to impose itself as a fact which people are content to state, and not as a refined and subtle invention whose origin is artificial or statutory."

All corporations have to derive their existence either from combined action by their founders or from delegation by some already existing authority, and the State cannot pretend to another origin. If it exists by nature (φύσει), it is not a corporation, if it exists by agreement (νόμῳ) it has to be deduced from the will of individuals. This means that in a juridical sense the dogmatic construction ought to fall into the class of "relation" and not into that of "personality." As men combine for commercial, educational, or religious purposes, so they combine in order to defend themselves, to settle disputes, to suppress crime. Their combinations in the latter cases are naturally more lasting and complex than in the former, but they are of the same kind, and it is only by realizing the vital connection between the rights of the State and the interests of individuals that we can hope to build on a secure political foundation and to further social progress by means of a healthy state organization.[1]

The State as a juridical relation.

It would be difficult to make a decisive choice between these rival claims. The competing theories present at bottom figments of the mind intended to describe and to summarize actual facts, and not to govern them. More than this; in so far as these formulæ draw on concepts devised originally for other purposes, they are merely analogies, and cannot be taken to apply to all the conditions and consequences which are to be observed whether in the case of corporations or in that of legal relations, in the sense attached to these terms by private law. Such analogies are most useful, as they suggest inferences, but in using them one must be careful to remember that the abstractions of public law brought into line with them stand on their special basis. It is obvious that, e.g., *consent* cannot play in constitutional law the decisive part it plays in the private law treatment of legal relations. Again, it would be absurd to regard citizenship from the point of view of membership in a corporation, or to derive sovereignty from the function of management of corporate interests. As for the doc-

Limits of analogies from private law.

[1] DUGUIT, *Études de droit public*, I, pp. 196, 258. LÖNING, *Handwörterbuch der Staatswissenschaften*, 3rd ed., VII, p. 701.

trinal idea of a *general will*, it has been the stumbling-block of political theories which have attempted to work out the notion of the State as a subject of right too closely on the pattern of moral personality.[1] The same may be said of the notion of *natural rights* as the basis of political combination.[2]

When all this is well understood, there is no objection to using both juridical doctrines—that of the corporation and that of the legal relation—to illustrate the working of the State in its different aspects; and, in practice, these analogies have contributed greatly to elucidate the bearing of such institutions as the fiscus, proceedings against the Crown, the responsibility of officers, the line of demarcation between crime and delict, the problem of the rights of the individual, etc. In fact, any topic of public law may be made the subject of interesting examination either from the point of view of the doctrine of *corporation* or from that of *legal relation*. The detailed discussion of this point must, however, be left to students of public law. What I should like to emphasize in conclusion as regards the general relations between political science and law, are the following two points derived from

[1] Cf. DUGUIT, *Les transformations du droit public.*

[2] BENTHAM, *Traité de législation*, ch. xiii (*Works*, I, p. 136): "To maintain that there is a natural right and to impose it as a limit to positive laws, to say that law cannot go against natural right, to recognize, in consequence, a right which attacks law, which overturns and annuls it, is at once to render all government impossible and to defy reason." "Right is the creature of law" (I, p. 135—*Sophismes anarchiques*). Cf. MICHEL, *L'idée de l'État*, pp. 83 ff.; THALLER and others, *L'œuvre juridique de R. Saleilles*, p. 333. Yet the notion returns in Spencer's teaching. BARTH, *Philosophie der Geschichte als Sociologie*, p. 116: "This [Spencer's] law of nature is by no means primitive law, nor is it the law of the strongest as evolved by Nature alone and without the admixture of any essentially human considerations. It is an ideal system, built up by means of philosophical deduction, and claiming freedom and equality for every member of the community. Nevertheless, this conception of natural law appears to furnish Spencer with a motive for maintaining the sovereignty of nature in society. In defiance of the Utilitarians, he clings to natural law and to 'natural rights.'" [*Social Statics*, ch. v, par. 3; *The Man v. the State*, pp. 87 ff.] "Every human being has a right to develop, in perfect liberty, all those faculties which do not trespass on the similar liberty appertaining to every other human creature." [*Social Statics*, p. 94.]

the above discussion. (1) The attempt to define the nature of the State in juridical terms is not a quibble of the lawyers. It is an obvious consequence of the view that State and government in a civilized country, in spite of all their might, have to conform to a rule of law,[1] and that the more closely their functions are subjected to the application of ordinary legal rules and methods, the better will be the guarantees against oppression, corruption and arbitrary measures. (2) On the other hand, as the permeation of the State with juridical principles can only be regarded as an approximation to the standards of law, dependent in the last resort on conditions of fact and on the distribution of real forces, all attempts to follow the possibilities of wrong, resistance and conflict to their ultimate consequences are bound to transcend the framework of positive law and of regular State institutions. Eventually persons and nations aggrieved by acts of State have to appeal to extra-legal means, to emigration, to passive or active resistance, to revolution. Apart from such desperate cases they can appeal, and they do appeal constantly, to public opinion—by way of the press, of meetings, of public and secret agitation. In this form we have the stream of criticism and of opposition to government and even to the State ever flowing in front of us. These appeals are extra-legal, though not necessarily illegal. They are addressed to *society*. Just because the State is so intimately bound up with law, it is unable to satisfy the pressure of the varied currents of economic, religious, cultural aspirations by its exclusive action. Even in its own sphere—in the domain of political life—it is dependent both for the initiation and for the ultimate defence of its rules and institutions on the action of society. All great movements of reform and legislation start from public opinion, and obedience to law and government could not be enforced for a moment if people failed to support them or stood up against them. It has been often pointed out that public order in the broad sense of the word is maintained not by a few police-

[1] Cf. DICEY, *Introduction to the Law of the Constitution*, 6th ed., pp. 180 ff.

men, but by the more or less explicit approval of the public at large.

Of course there is the army. But what would become even of the mightiest army, if, in addition to external discipline, there was not the moral resolve of the soldiers to defend the country and to uphold its laws? The Russian Army of 1917 counted its soldiers by millions, but it could not have inscribed the epitaph of Thermopylæ on the tombs of its dead. Summing up this discussion as to the nature of the State, we may say that it is an organization enforcing social order by means of legal rules.

Aims of the State-Protection.

The dependence of State machinery on the requirements, feelings and opinions of society becomes even more apparent when we proceed to examine the *aims* of the State. The question as to the aim of the State is a necessary complement to the question concerning the nature of the State.

It may be said at once that the aims of the State are not always the same. It is only the *minimum* requirements that recur under all circumstances. All States and even all rudimentary governments aim at *protecting* their members from outsiders, and to some extent, from the disorderly conduct of fellow-citizens. The measure of that protection varies greatly; one may say that the action of the State for this elementary purpose develops on the line of a spiral. At the start it increases with the progress of society involving more complex relations, more active cooperation and better methods for arranging political machinery and putting it into motion; later on, it generally diminishes, as people get more used to arranging their affairs themselves, develop capacities of individual enterprise and begin to resent government interference. Then, it may increase again in order to lessen the evils of bitter competition and class struggle. The tendency towards restricting the State is essential to individualistic liberalism and has been expressed in the history of political thought by the *laissez faire* policy. It is characterized in doctrine by pronouncements like that of Thomas Paine, that government is a necessary evil.[1]

[1] SPENCER, *Man versus the State* (1884), p. 33: "If, without

Welfare.

Within the range of this view of restricted State influence we are made to feel that the solution of the problem depends on a certain conception of social intercourse: the State is assigned purely negative duties, because the numerous positive requirements of human life ought to be met by the energy of individuals and by their co-operation on non-political lines. In practice, however, there are no States which hold themselves strictly within the limits of negative protection. All historical commonwealths attend more or less to the positive requirements of their subjects—to their *welfare*. They are driven to it even by considerations of finance: taxpayers have to be shorn, but the process of shearing depends largely on the quality and quantity of wool, in other words on resources and economic conditions. For this reason the care of the people's welfare came to be treated as a distinct aim of government by the most callous of "enlightened" despots. Frederick II of Prussia was a great husbandman of his kingdom, efficient not only in pressing unwilling recruits into his regiments, but in the thrifty and systematic exploitation of his subjects: his finance was based on State protection of colonization and industry. No wonder the policy of welfare developed into a systematic branch of knowledge at the same age as the policy of security.[1]

The liberal movement diverted the course of this evolution for a short time, but State interference set in again with increased strength in consequence of the spread of socialistic views. It is no longer a matter of theory in our time. German State socialism sacrifices liberty to the ideal of State-controlled well-being, and as for the more advanced factions of social democracy, they discard the

option, he has to labour for the society and receive from the general stock such portion as the society awards him, he becomes a slave to the society. Socialistic arrangements necessitate an enslavement of this kind: and towards such an enslavement many recent measures, and still more the measures advocated are carrying us." An interesting formulation of the restrictive doctrine as regards the State was made by Wilhelm v. Humboldt in his treatise, *Ideen zu einem Versuch die Grenzen der Wirksamkeit des Staates zu bestimmen* (1792). Cf. Haym, *Wilhelm von Humboldt*, pp. 46 ff.

national State altogether, but agitate for a social organization which will place private life under the constant supervision and direction of an organized society possessing all the qualifications of a sovereign State.

It is characteristic of the progress of the social functions of the State on the Continent that continental political science has been gradually shifting its ground in order to fit in its teaching with the various attempts and measures to organize social welfare. Lorenz Stein, a disciple of Hegel and a rival of Marx, made the contrast between government and society the basis of his theory of public law. It became the dominant doctrine in German universities, and eventually the idea of a *cultural* guardianship (*Kulturpflege*) in matters of religion, of literature, of science, of education and of economics led to the growth of a distinct department of political science supported by special administrative institutions and a specialized branch of public law. It is not without interest to listen to the programme of this study as sketched by Professor Edmund Bernatzik of Vienna:[1] "We realize nowadays that the poor must be protected by the State in a much greater measure than has happened up to now. Among other things, this knowledge has made necessary far-reaching changes in police laws and measures which all countries have started according to their respective state of civilization and with which they will continue far into the twentieth century.

"The experiences which we have gathered from the social struggles of the nineteenth century, have taught us that the mere issuing of laws is of little use unless their observation is entrusted to the right persons and carefully watched. During the period of liberalism we were only too easily content with merely issuing protective police-laws. It was a cardinal fault in the judicial organization of police that, while there was ample protection against too much police activity, there was hardly any against inactivity and laxity, from which the poor suffer particularly. The second half of the last century is characterized by the

[1] *Kultur der Gegenwart*, VIII, pt. III, p 396.

creation of departments whose special function it is to see to the carrying out of the social public laws, namely, the so-called 'inspectorates' (of factories, trades, mines, sanitation and housing). The extraordinary importance which has since then been attached to statistics is closely connected with this.''

Modern tendencies in England.

The Western democracies are fully aware by this time of the possibilities and character of State action and control in social matters. The new orientation of social studies in England is, for instance, illustrated by the activities and writings of Sidney and Beatrice Webb. Their works on trade unions, on the reform of the Poor Law, and on Local Government are meant to provide not only theoretical but practical instruction. They are remote from the Utopian dreams of Stateless mankind: it is the function of social welfare that stands in their foreground. In *Industrial Democracy* for instance, we read:[1] ''Above all these, stands the community itself. To its elected representatives and trained Civil Service is entrusted the duty of perpetually considering the permanent interests of the State as a whole. When any group of consumers desires something which is regarded as inimical to the public well-being . . . and when the workers concerned, whether through ignorance, indifference or strategic weakness, consent to work under conditions which impair their physique, injure their intellect, or degrade their character, the community has, for its own sake, to enforce a National Minimum of education, sanitation, leisure and wages. We see, therefore, that industrial administration is, in the democratic state, a more complicated matter than is naïvely imagined by the old-fashioned capitalist, demanding the right to manage his own business in his own way. In each of its three divisions, the interests and will of one or other section is the dominant factor. But no section wields uncontrolled sway even in its own sphere. The State is a partner in every enterprise. In the interests of the community as a whole, no one of the interminable series of decisions can be allowed to run counter to the consensus

[1] Sidney and Beatrice Webb, *Industrial Democracy* (1902), p. 822.

of expert opinion representing the consumers on the one hand, the producers on the other, and the nation that is paramount over both."

It is not our business to discuss the merits of these programmes. Our object is merely to show that welfare as the aim of the State supposes the closest interdependence between political and social organization.

It is not necessary to take sides in the momentous controversies between Individualism and Socialism, between syndicalism and State doctrine, in order to feel that modern jurisprudence is bound to take stock of the movements of opinion and of the collisions of interests that surround it on all sides. The Courts constantly have to pronounce decisions in the social struggles of the time and to formulate rules in order to harmonize and to define conflicting interests. Nor can the theory of law remain an indifferent onlooker in the crisis. It becomes more and more evident that the time-honoured opposition between private law and constitutional law is not appropriate to the present state of legal thought. Even the insertion of administrative law on the American or the French pattern could hardly satisfy the requirements of contemporary jurisprudence. What is really indicated by the examples of the treatment of the subject on the Continent is the development of the conception of *Public law* on the lines of a comprehensive treatment of the rights and duties of various social organizations—municipal, ecclesiastical, professional, educational, literary—that have stepped in between the individual and the State and are daily growing in importance in their task of organizing scattered individuals into conscious and powerful groups. The specialization of such a department of law is rendered necessary by the fact that jurists have in these matters to operate not so much with the concepts of equity and of direct command, but with the concepts of public utility and social solidarity, and it is not conducive to a fair and broad-minded treatment of these subjects to entrust it exclusively to lawyers brought up on an entirely different range of ideas. The great traditions of English Law preclude sudden or extreme changes in this respect,

and such root and branch changes are not wanted. What is wanted is the growth of a specialized legal theory, of differentiated legal teaching and of corresponding practice of Bar and Bench.

Moral aims of the State.

One more aspect of political life remains to be considered, namely, the *moral* aim of the State. History is full of examples of measures for promoting morality and virtue by laws and political institutions. This aim was emphatically put forward by the Greek philosophers; it was the root of many measures of Roman statecraft—the *cura morum*, the censorial jurisdiction, etc. It is inherent in any political construction under the influence of theocratical ideas: Catholicism, Puritanism, Islam, Brahmanism, Buddhism, have all influenced legislation with this view. In our secular polity it manifests itself mainly by educational experiments and by the conflicting propaganda of political theories. There is one side of this ethical aspect of the State which deserves special notice even in our days, namely, the tendency to regard the State as the main agent in raising the individual from the selfishness and narrowness of his private existence to the interests, feelings and habits of an enlarged personality.[1]

The idea of the enlargement of personality involved in social life is a profound and fruitful idea. Consciously and unconsciously a man is lifted by this process of expansion from the level of his immediate appetites to a comprehension of duties, of rights, of justice, to a practice of self-control and self-sacrifice. But there is no reason for assigning this momentous evolution exclusively or even principally to the domain of the State. The process in

[1] See, for example, the idealistic characterization of the State based on Hegel and Green's teaching in Bosanquet's *Philosophical Theory of the State* (1910), p. 150: "The State is not only the political fabric, . . . it includes the whole hierarchy of institutions by which life is determined, from the family to the trade, and from the trade to the Church and the University. Pp. 187 f.: "We supposed ourselves prepared to do and suffer anything which would promote the *best life of the whole*. . . . The means of action at our disposal as members of a State are not *in pari materia* with the end. It is true that the State as an intelligent system can appeal by reasoning and persuasion to the *logical will* as such."

question is the *social* process at large, with all its ramifications in family life, in social co-operation, in educational and literary intercourse, in religious organization, as well as in political grouping. Thus we are led again from political doctrine to social science as a whole.[1]

As a result of this survey of the connection between social science and law it may be stated that, apart from the many special occasions in which both have to meet, the solution of two great problems will entirely depend on an active co-operation between these two branches of knowledge: (1) the problem of the relation of State and Law to the individual and his sphere of interests, rights and duties: (2) the relation of State and Law to the various groups in which human solidarity finds expression—family, local centre, business unions, educational institutions, literary circles, churches, states, international relations.

These studies ought to form the backbone of a general science of society, of the sociology discovered by Comte and Spencer.

[1] IHERING, *Zweck im Recht*, I, p. 67; DUGUIT, *Transformations du droit public*, xvii.

PART II

METHODS AND SCHOOLS OF JURISPRUDENCE

CHAPTER V

THE RATIONALISTS

The main currents of thought.

It is time to enter on our special field of study and to ask: What shape have the aims and methods of Jurisprudence assumed under the influence of the various sciences with which it is connected? The best way of treating the matter will be to examine the most important conclusions arrived at by leading authorities on the theory of law, and to define the ground we consider right to occupy in the midst of conflicting views.

There can be no question of following in detail the windings of the innumerable controversies on the subject of jurisprudence:[1] this would be a task of great promise and interest which requires special treatment in a history of juridical literature. I must restrict myself to a more modest scheme, namely, to pointing out in what respects contemporary conceptions of jurisprudence have been prepared in a direct way by previous thinkers. For this purpose it is not necessary to go very far back in tracing the course of development, although the Greeks, the Romans, mediæval schoolmen and Renaissance scholars have contributed largely to laying the philosophical and technical foundation of our study. But the vital results of their

[1] There is no satisfactory account of the general development of jurisprudence. Bergbohm, *Jurisprudenz und Rechtsphilosophie*, (Leipzig, 1892) teems with details, but is confused and bewildering. R. Pound's survey in the *Harvard Law Review* may help to trace distinctions, but suffers from lack of perspective and of organic connection between the parts. An excellent treatment of the German literature on the subject is presented by Stintzing and Landsberg's *Geschichte der deutschen Rechtswissenschaft* (3 volumes in 5 parts, 1880-1910). The development of political doctrines in France is well traced by H. Michel, *L'idée de l'État* (1896). The methods and schools of Comparative Jurisprudence as treating the origins of law, are characterized by P. Vinogradoff in the article on Comparative Jurisprudence in the 15th volume of the *Encyclopædia Britannica* (11th ed.). Leslie Stephen on the *English Utilitarians* is important for the understanding of the Rationalists.

doctrines have been appropriated and digested by more recent inquirers. We shall have to deal with these results in the shape and in the measure in which they have been "received" by leaders of thought within the last three hundred years.

Looking back on the glorious efforts of European philosophy and science, one certainly has not to fear lack of material, but rather to guard against overcrowding and confusion. In the case of a theoretical inquiry, it is especially important to follow clearly defined tracks and not to lose the guiding threads on account of tempting digressions. There are conspicuous landmarks that will help us to find our way in the maze of doctrines: broadly speaking, the course of juridical theory has proceeded in three main channels formed by the movements of general European thought: it started with the predominance of *rationalism* in philosophy and science; a decisive *Romantic reaction* set in against the narrow standards of the rationalistic methods and, eventually, the idea of *evolution* spread over the whole field of natural and social sciences. Let us examine the characteristic features of these three stages of development and conclude by noticing the main threads of contemporary jurisprudence.

Rationalism and empiricism.

It is common knowledge that the remarkable progress of mathematical and natural sciences in the seventeenth and eighteenth centuries impressed upon the minds of European thinkers the conviction that facts of human politics, morals and law could be and ought to be subjected to the same methods of observation and deductive reasoning as the facts of astronomy, mechanics, physics, etc., and that analysis and systematization on scientific lines had to replace statements founded on authority and tradition.

In the "humane studies" the rational side of the inquiry was even more prominent than in natural science, because the material to be operated upon was not amenable to direct observation by the senses in the same way as the planetary system or the phenomena of hydrostatics.

In consequence, it was not so much observation as ratio-

cination (reasoning) that served as a lever in the inquiries of the period of enlightenment. "The French encyclopædists of the eighteenth century imagined they were not far from a final explanation of the world by physical and mechanical principles; Laplace even conceived a mind competent to foretell the progress of nature for all eternity, if but the matter, the positions and the initial velocities were given. The world conception of the encyclopædists appears to us as a kind of mechanical mythology in contrast with the animistic mythology of the old religions."[1]

Both sides of the scientific process are represented in the rationalistic philosophy and science of these times—the mathematical method building up its conclusions on the basis of initial postulates by evolving consequences and relations of symbolic concepts, and the physical method discovering the properties of facts ascertained by human experience and co-ordinating these facts as causes and effects under scientific laws.[2]

This double aspect of rationalistic thought has to be clearly realized and kept in view. It establishes a fundamental difference between abstract reasoning in the domain of the "natural philosophy" of the age of enlightenment and the activities of mediæval schoolmen, who were also masters of dialectical reasoning, but, as Bacon had shown with decisive effect, were quite unable to do justice to experience as the great storehouse of substantial knowledge.

On the other hand, the bold attempt to obtain an intellectual mastery of nature—physical as well as human—forms the general characteristic of the period even though it was embodied in two distinct currents—the rationalistic group proper, led by Descartes, drawing deductions from *a priori* principles: and the empirical group, starting with Bacon and looking to experience as the foundation of human ideas.

Let us notice more particularly that the representatives

[1] A. Mach, quoted by Whetham, *The Recent Development of Mechanical Science* (4th ed., 1909). The subject is discussed in detail by A. S. Lappo-Danilevsky in the *Bulletin of the Russian Academy of Sciences* for 1918 (Russian).

[2] Merz, *History of European Thought*, I, 100, 314 ff., 396 ff.

of the *empirical* school—Locke, Hume, Adam Smith, Bentham—were themselves rationalists in so far as they trusted to purely intellectual interpretation of the facts of mind and society.

The psychology of the associationists, the political economy of the classical school, the social science of the utilitarians were governed by rationalistic conceptions. This is strikingly apparent in the treatment of psychological problems. Locke's and Hume's ideas are the results of introspection into the activity of the intellect. Feeling is hardly sketched by this psychology, which attempted to explain the working of the human mind by analysing the chance combinations of *ideas* called forth by impressions from the outside world.

As introspective inquiry was concentrated on the intellectual side of the associative process, it did not lead to greater results in the field of psychology than those achieved by the purely abstract theory of "faculties" built up by the school of J. Chr. Wolff. The difference between the two branches of the study consisted in their metaphysical implications and in the manner of grouping ideas into accidental or permanent combinations, more than in a fundamental contrast in the conception of mental life.[1]

Educational theories.

The movement of moral ideas is especially characteristic in the domain of education, one of the favourite subjects of eighteenth century society. The article on education in the Encyclopædia of Diderot and D'Alembert is composed in a spirit of purely rationalistic Sensualism.[2] It starts from the axiom—*je sens, donc j'existe.* It sets its faith in logic, and recommends reasoning as the unfailing method of imparting truth to pupils. It prohibits fables and fairy

Practical application.

[1] LESLIE STEPHEN, *The English Utilitarians*, II, p. 290: "Philosophy is by some people supposed to start from truths, and thus to be in some way an evolution of logic. According to Mill it must start from facts, and therefore from something not given by logic For Mill the ultimate facts must be feelings The *Penser c'est sentir* or the doctrine that all 'ideas' are transformed sensations is his starting point." For a transition see JAMES MILL'S *Analysis of the Human Mind.*

[2] *L'Encyclopédie; dictionnaire des sciences, des arts et des métiers*

tales. The prophet of the second half of the century, J. J. Rousseau, on the contrary scorns pedantic reasoning and appeals to emotion. But his *Émile* nevertheless remains a product of intellectualistic thought, with this difference, that instead of the pupil, it is the instructor who proceeds by clearly devised plans and methods. The pupil is a kind of lay figure in which impressions, associations and sympathies are called forth by a skilful master.[1]

Abstract method in political economy.

In political economy the influence of rationalistic thought was deeper and productive of greater results. The simplification achieved by restricting the inquiry to the working of the one motive of seeking profit led to a brilliant display of dialectical skill and to many important generalizations. And yet even here the cogency of argument and the scientific character of the treatment were obtained at the price of a wilful narrowing of the range of observation and the abstract treatment of the subject.[2] Modern students of economics have often called attention to Ricardo's one-sided but powerful analysis as the most characteristic expression of the rationalistic frame of mind.[3] Although his work falls into the first half of the nineteenth century, he is in spirit a thorough-going representative

(1775), p. 402: "It is Philosophy's constant axiom that our thought adds nothing to what the objects are in themselves. . . . Each individual perception must have its particular cause or its own motive."

[1] MORLEY, *Rousseau*, II, p. 213: "One day Emilius comes to his beloved garden, watering-pot in hand, and finds to his anguish and despair that the beans have been plucked up, that the ground has been turned over, and that the spot is hardly recognizable. The gardener comes up, and explains with much warmth that he had sown the seed of a precious Maltese melon in that particular spot long before Emilius had come with his trumpery beans, and that therefore it was his land; that nobody touches the garden of his neighbour, in order that his own may remain untouched; and that if Emilius wants a piece of garden, he must pay for it by surrendering to the owner half the produce. Thus, says Rousseau, the boy sees how the notion of property naturally goes back to the right of the first occupant as derived from labour."

[2] LESLIE STEPHEN, *The Science of Ethics*, pp. 14, 15: "If we had but a single passion, if we were but a locomotive stomach like a polyp, the problem would be simple. . . . Who can say what is the relative importance of the various parties in the little internal parliament which determines our policy from one moment to another?"

[3] BRENTANO, *Die klassische Nationalökonomie*, 4 ff.

of the deductive method originated by eighteenth century enlightenment.

In *social science* the method of rationalistic reflection was equally conspicuous, although much more difficult of application, and therefore it did not yield scientific results similar to those achieved by political economy.

It is sufficient to mention the doctrine of the "state of nature" which has inspired so many "Robinsonian" speculations of eighteenth century philosophers and statesmen. It hinged on the notion that the natural relations between a man and his fellows could be discovered by careful introspection, freed from the distortions produced by prejudice and sinister interests.[1] Natural law had, of course, to be reconstructed on lines traced by reason.

Rationalistic individualism.

It was necessary for this purpose to start from the single individual and to build up society as a combination of reasonable beings.

The fatal tendency of rationalistic thought towards the simplification of experience by the isolation of the single individual[2] explains the indifference and even hostility towards the principal source of social experience, namely, history. The latter is not only ignored, but treated with hatred and contempt, as a source of superstition and mischievous authority.[3]

[1] BENTHAM, *Principles of Judicial Procedure*, ch. ii (*Works;* ed. Bowring, 1843).

Book of Fallacies, Pt. II, ch. ii (*Works*, II, p. 420): "I am a lawyer [would one of them be heard to say],—a fee-fed judge—who, considering that the money I lay up, the power I exercise, and the respect and reputation I enjoy, depend on the undiminished continuance of the abuses of the law, the factitious delay, vexation, and expense with which the few who have money enough to pay for a chance of justice are loaded, and by which the many who have not, are cut off from that chance,—take this method of deterring men from attempting to alleviate these torments in which my comforts have their source."

[2] LESLIE STEPHEN, *The English Utilitarians*, III, p. 315: "A difficulty arises from the defective view which forces Mill to regard the whole process as taking place within the life of the *individual*. The unit is then a being without moral instincts at all, and they have to be inserted by the help of the association machinery."

[3] BENTHAM, *The Book of Fallacies*, Pt. I, ch. ii (*Works*, II, pp 339, 400): "On no one branch of legislation was any book extant, from which, with regard to the circumstances of the then present times, any useful instruction could be derived: distributive law,

Fundamental Selfishness.

Having got hold of the individual as the isolated subject of analysis, rationalistic thought proceeded to examine the guiding motives of his conduct and came to the conclusion that all these various motives could be derived from one main principle—the pursuit of happiness, that is, the striving for pleasure and the avoidance of pain.[1]

There were also other views, but they did not obtain anything like the influence achieved by the doctrine of selfishness. The experience of life transforms selfishness into morality as regards others. The leading moralists laid stress on different considerations in order to explain the transition from egoism to altruism: the derivation of

penal law, international law, political economy, so far from existing as sciences, had scarcely obtained a name: in all those departments, under the head of *quid faciendum*, a mere blank: the whole literature of the age consisted of a meagre chronicle or two, containing short memorandums of the usual occurrences of war and peace, battles, sieges, executions, revels, deaths, births, processions, ceremonies, and other external events, but with scarce a speech or an incident that could enter into the composition of any such work as a history of the human mind—with scarce an attempt at investigation into causes, characters, or the state of the people at large. Even when at last little by little, a scrap or two of political instruction came to be obtainable, the proportion of error and mischievous doctrine mixed up with it was so great, that whether a blank unfilled might not have been less prejudicial than a blank thus filled may reasonably be a matter of doubt."

Cf. *Principles of the Civil Code*, Pt. I, ch. xv (*Works*, I, p. 318): "I cannot refrain from noticing here the ill-effects of one branch of classical education. Youth are accustomed from their earliest days to see, in the history of the Roman people, public acts of injustice, atrocious in themselves, always coloured under specious names, always accompanied by a pompous eulogium respecting Roman virtues. . . . The history of the Grecian Republics is full of facts of the same kind, always presented in a plausible manner, and calculated to mislead superficial minds. How has reasoning been abused, respecting the division of the lands carried into effect by Lycurgus, to serve as a foundation to his warrior institution, in which, through the most striking inequality, all the rights were on one side and all the servitude on the other."

[1] HOBBES, *Elementorum philosophiae*, sectio tertia: "De Cive," cap II, i: "Est igitur lex naturalis dictamen rectae rationis circa ea quae agenda vel omittenda sunt ad vitae membrorumque conservationem quantum fieri potest, diuturnam."

Cf MORLEY, *Rousseau*, II, p. 219: "He repeats again and again that self love is the one quality in the youthful embryo of character from which you have to work. From this, he says, springs the desire of possessing pleasure and avoiding pain, the great fulcrum on which the lever of experience rests."

morality from utilitarian motives remains common ground for most empirical intellectualists. It is highly characteristic that none of the older utilitarians attached much importance to the educational influence of social surroundings in moulding morality and transforming individual interests into social habits and rules: this aspect of development was bound to attract attention when historical conditions came to be taken into consideration, and eventually it did lead to the formation of the group of the so-called social utilitarians.

But history had no value for the rationalists themselves, and as social development was for them merely the sum of individual experiences, the entire transformation from selfishness to morality had to be effected by means of the calculus of utilities.[1]

Rationalistic thought reached its highest point in Bentham's ideal of the greatest happiness of the greatest number, an ideal which in its quantitative formulation necessarily tended towards an accumulation of material goods for equalized individual units.

Rationalistic enlightenment forms, as it were, the background for the jurisprudence of the utilitarian stamp, which is still religiously kept up in the law schools of twentieth-century England.

Idea of Freedom.

Before analysing the main points of that jurisprudential doctrine, let us mention briefly a group of theories which, though constructed on rationalistic lines, form a contrast to the utilitarian school. It may be said on the whole that the rival views are in conflict because one takes its stand on the principle of individual liberty while the other starts from the idea of State coercion: the opposition has to be formulated on broad lines and does not exclude a good many compromises and transitions, but I do not think the general drift of the contending schools of thought can be mistaken. What may be called the liberal orientation is represented most effectively by Locke, Rousseau and

[1] Bentham's position in this respect is well known. But it should be noticed that utility forms the keystone not only of the classical school in political economy, but also of Jevons' teaching.

Kant. Their teaching culminates in the idea of contract, as the basis of political and legal organization. It is sufficiently known how the compromise settlement of the English revolutionary period found its theoretical exponent in Locke and was adapted to the requirements of Common Law by Blackstone.

It may be worth noticing that the historical foundations of that course of development were wider than the struggle between King and Parliament, between monarchical discretion and the rule of traditional law: the declarations of Right of the American Colonies embodied in the Constitutions of single States and of the Union, provide eloquent testimony to the profound meaning of the struggle for individual liberty and for a government founded and supported by agreement.[1]

Rousseau's position is more complex: he started from the notions of natural freedom and of an original contract, but he is aware of the difficulty of building up a commonwealth from individualistic materials; and in his attempt to distinguish between the will of that commonwealth (*volonté générale*) and the aggregate will of its members (*volonté de tous*) he was driven to a unification of the State in the shape of a "moral person,"[2] endowed with absolute control over its component parts. In the last resort there is not much to choose between Rousseau's ideal democracy and Hobbes' ideal monarchy.[3]

[1] JELLINEK, *Erklärung der Bürgerrechte* (1895).

[2] BOSANQUET, *The Philosophical Theory of the State*, pp. 98 ff.: "Each individual may consider the moral person which constitutes the State as an *abstraction* (*être de raison*), because it is not a man; he would enjoy the rights of the citizen without consenting to fulfil the duties of a subject—an injustice, the progress of which would cause the ruin of the body politic. In order then that the social pact may not be a vain formula, it tacitly includes the covenant, which alone can confer binding force on the others, that whoever shall refuse to obey the general will, shall be constrained to do so by the whole body, which means nothing else than that he will be forced to be free."

[3] Cf. HOBBES, *op. cit.*, cap. ii, par. 2: "Actiones omnium a suis cujusque opinionibus reguntur. Quare illatione necessaria et evidenti intelligitur pacis communis interesse plurimum, ut nonnullae opiniones vel doctrinae civibus proponantur, quibus putent, vel se jure non posse legibus civitatis obtemperare, vel licitum sibi esse ei resistere, vel majorem minore sibi neganti, quam praestanti,

The roots of the dogmatic construction are obviously to be found in a rationalistic individualism incapable of conceiving any other motives than those derived from personal interest and therefore incapable of making room in a social life for any power but that of a strong personality—either individual or collective.

Conscience and duty.

Kant introduced yet another factor. He was much impressed by the works of Rousseau.[1] But the principal factor in his estimate of the world was the recognition of the imperative claim of individual conscience.[2] His famous ethical formula combines the idea of personal *duty* and of universal *law*. In his view the ultimate sanction of social order and of its rules lies in its justification before individual reason. In so far as *freedom* appears as the fountain of law and of the State men ought to obey rules because they are free to set them up in accordance with their reason (*Verstand*). Kant was not very successful in working out this magnificent principle of "self-determination" in detail,[3] but his speculations were anything but mere professorial exercises. They reflect the innermost aspirations of continental idealists in the great crisis of the eighteenth century. The Declaration of the Rights of Man of 1789 was dictated by the same idea of freedom, and though frustrated on many occasions by harsh realities, it has remained the great landmark and beacon of high-minded liberalism in the world.[4]

obsequium. Si enim unus imperet aliquid facere sub paena mortis naturalis, alius vetet sub paena mortis aeternae uterque jure; sequetur non tantum cives, etsi innocentes, puniri jure posse, sed penitus dissolvi civitatem. Neque enim servire quisquam duobus dominis potest; neque is, cui obediendum esse credimus metu damnationis, minus dominus est, quam is cui obeditur metu metus temporalis, sed potius magis. Unde sequitur erga illum unum . . . cui commissum est summum in civitate imperium, hoc quoque habere juris, ut et judicet quae opiniones et doctrinae paci inimicae sunt, et vetet ne doceantur."

[1] CAIRD on *Kant*. LANDSBERG, *Geschichte der deutschen Rechtswissenschaft* (1910).

[2] The categorical imperative; SIMMEL, *Kant*, p. 85.

[3] LANDSBERG, *op. cit.*

[4] BEUDANT, *Cours de droit civil, Introduction* (1896), p. 8: "An entirely different point of view was consecrated by a famous Act of the French Revolution: The Declaration of the Rights of Man [Oct. 2, 1789]. 'Right is a property inherent in human nature;

Compulsion.

A second and entirely different current of thought must also be traced from the troubled times of the wars of religion: it culminates in the idea of *authority* as opposed to the idea of *freedom*. The terrible object lessons of civil dissensions taught Bodin to look for decisive *sovereignty*, as the pivot of political and legal arrangements.[1] The idea was not new: it had, for example, inspired Dante in his appeal for a monarchy towering over the feuds of mediæval Europe.[2] With Bodin the principle struck root in an abiding manner. Hobbes made it the central notion of his political system. It is needless to rehearse the well-known statements of his famous plea for the uncontested and absolute authority of the sovereign in matters of law and opinion.[3]

It is perhaps worth while to point out that Hobbes was by no means isolated in his contention that law and the State are to be governed by a sovereign will based on overwhelming force. The great Jewish thinker, Spinoza, in his detachment from practical strife, came to a similar conclusion.[4]

As rearranged by Samuel Pufendorf, Hobbes' doctrine became the gospel of enlightened police government in Europe.[5]

. . . it forms a part of human nature, and it is only the outcome and application of it. [Art 4.] Liberty consists in doing everything that does not harm another; thus the only limits to the exercise of natural rights on the part of each man are those which ensure the enjoyment of these same rights for other members of society. These limits can be determined only by law.' . . . The State does not dispense rights; it is only a mechanism constituted for their protection. This is the modern idea of right [Bossuet, *Cinquième avertissement aux protestants*, par. 32]: 'There is no right against right.' Human right is before the law and is above the laws." Cf. BEUDANT, *Le droit individuel et l'État*.

[1] BAUDRILLART, *J. Bodin et son temps*.

[2] *De Monarchia*.

[3] *Op. cit*, par. 14: "Neque sibi dare aliquid quisquam potest, quia jam habere supponitur quod dare sibi potest, neque sibi obligari: nam cum idem esset *obligatus* et *obligans*, obligans autem possit obligatum liberare, frustra esset sibi obligari, quia liberare se ipsum potest, jam actu liber est Ex quo constat, legibus civilibus non teneri ipsam civitatem."

[4] *Tractatus Theologico-politicus*.

[5] LANDSBERG, *op. cit.* LAPPO-DANILEVSKY, *L'idée de l'État*, in *Essays in Legal History*, ed. VINOGRADOFF (1913).

In a sense its greatest triumph was achieved by the Napoleonic rule, when it restored order in France, broke the bonds of the feudal privilege in central Europe and settled the law of individualistic society in the Code Civil.

Bentham.

As regards law, the doctrine of absolute sovereignty was by no means confined to purely monarchical States: it was adapted by Bentham to the requirements of industrial democracy in England. Hobbes had already laid down that the form of government was not material in itself: monarchical despotism was most appropriate for the sake of unity, but other combinations were also possible, provided the uncontested authority of government over the subjects was maintained. Bentham, on his side, held that democratic institutions were desirable, but emphasized nevertheless the absolute power of compulsion as the necessary attribute of any government worthy of the name.[1]

He had no sympathy whatever with the vagaries of the French Revolution and strongly condemned all measures likely to produce dissensions and a decline of governmental authority.[2] But he advocated a rationalistic recasting of the laws in every direction—in private law, in criminal law, in the judicial and administrative system. The one method recognized by him as adequate was that of a systematic and rational legislation culminating in a Code. The historical fabric of Common Law and the process of casuistic expansion stood condemned as products of sinister interests and as fatal obstacles to a rational administration of justice.[3]

[1] *Constitutional Code*, Bk. I, ch. xv (*Works*, IX, p. 96).

[2] *Anarchical Fallacies*, Art. xvi (*Works*, II, p. 520): "Every society in which the warranty of rights is not assured [*toute société dans laquelle la garantie des droits n'est pas assurée*], is, it must be confessed, most rueful nonsense; but if the translation were not exact, it would be unfaithful: and if not nonsensical, it would not be exact.

"Do you ask, has the nation I belong to such a thing as a constitution belonging to it? If you want to know, look whether a declaration of rights, word for word the same as this, forms part of its code of laws."

[3] *Papers on Codification*, No. viii, Letter iv (*Works*, IV, p. 483): "The next time you hear a lawyer trumpeting forth his *common law*, call upon him to produce a *common law*: defy him to produce so much as any one really existing object, of which he will have the

Bentham was not content with a general revision of law for purposes of simplification and reduction to reasonable forms: he supplied a material aim for the action of the improved machinery. This aim was indicated by the doctrine of utility, which played so conspicuous a part in empirical philosophy. Mere forms without contents had no meaning for him, and he contrived to show to what extent the enlightened legislator could further the greatest happiness of the greatest number. In criminal law he tabulated, limited and justified the sanctions destined to deter people from breaking the law. His teaching on the subject, as well as legislation for simplifying procedure, has undoubtedly exerted a beneficial influence in throwing discredit on many barbarous practices of the English legal system. In this respect he worked in alliance with the powerful philanthropic movement represented by Beccaria, Howard, Haze, Grelet.

But he approaches this problem from a characteristic point of view, as a legislator dispensing carefully devised doses of painful remedies in order to assure the sanitation of diseased minds and to prevent healthy ones from catching the infection. The centre of operation is placed entirely in various forms of pressure from the outside—threats of condemnation by public opinion, threats of religion, threats of physical suffering, threats of coercion by the government. The treatment of private law is less interesting, but the tabulation of motives (security, liberty, etc.) is conceived and carried out in a truly rationalistic spirit.

Austin.

Bentham in his long career provided the living link between eighteenth-century and nineteenth-century thought. The activity of his successor in the field of jurisprudence—Austin—fell into the first half of the nineteenth century, but in the direction of his mind he belongs entirely to the period of rationalistic enlightenment. He did not contribute any new ideas to the creed laid down by Hobbes and Bentham, but elaborated their ideas on jurisprudence

effrontery to say, that that compound word of his is the name. Let him look for it till doomsday, no such object will he find."

in a more systematic and technical form. He thought himself that he ought to have been born a mediæval schoolman or a German professor.

Might, as Sovereignty, is for him the characteristic sign of the State. All questions as to justice and as to the aims of law are consigned to the domain of *positive morality*.[1] The rigid distinction between them and the field of law makes it possible for the lawyer to dismiss troublesome inquiries as to political and social needs and claims. The general halo of the happiness of the greatest number is still hovering round the "province of jurisprudence," although it is impossible to make out what logical connection exists between the command of the Sovereign and the utilitarian watchword. Austin's statements, in their extreme barrenness, were the appropriate vehicle for a theory of law in the sense of a formal machinery. As the bailiff serving a writ or the policeman effecting an arrest is formally justified by his warrant and would meet all protests and complaints by a reference to that warrant, so the judge from Austin's point of view is merely the agent of the Sovereign who has appointed him and who guarantees the execution of his decisions. It is not of his office to consider independently the justice of any claims except those expressly reserved by law or logically derived from existing legal rules. It is curious that this formalistic doctrine should have flourished in the surroundings of English Common Law in spite of the fact that the best traditions of that system are bound up with a constant striving to extend substantial justice to litigants, and to take into account as far as possible not only technical formalities but underlying ideas of right. In England the cumbersome practice of judge-made law has been constantly and rightly defended as the means of ensuring a progressive adaptation to altered conditions combined with a traditional continuity. And yet Austin, in the same way as Bentham, was naturally opposed to the unsystematic processes by which case law is evolved. His rationalism de-

[1] *Lectures on Jurisprudence* (3rd ed., 1869), I, pp. 89, 175 ff., 183, 338.

manded direct legislation and codification, and he did not conceal his contempt for the historical traditions of Common Law.[1]

In one of the modern textbooks based mainly on the Austinian doctrine, the author (Salmond) finds it best to introduce a correction by modifying the famous definition of law as a command of the Sovereign. For Salmond laws are the rules followed by the judges in the administration of justice.[2]

This modification cannot be called a happy one: it begs the question. It does not attempt to explain the relation between the judges and statutory enactments or the function of the legislative power as such, but merely describes the function of the judiciary without referring it to any definite source. It could be maintained only if the judges were *eo ipso* legislators or the legislators judges. Austin was not guilty of such confusion, but simply declared all

[1] See, e.g., his severe condemnation of Blackstone, written in a style worthy of Bentham himself. "He owed the popularity of his book to a paltry but effectual artifice, and to a poor, superficial merit. He truckled to the sinister interests and to the mischievous prejudices of power; and he flattered the overweening conceit of their national or peculiar institutions, which then was devoutly entertained by the body of the English people, though now it is happily vanishing before the advancement of reason." Vol. I, p. 71. Cf. vol. II, pp 547 ff., 670 ff. The disparaging estimate of the function of judges is clearly indicated in the treatment of the subject by the leading thinker of the school: HOBBES, *Dialogue between a Philosopher and a Student of the Common Law of England* (*English Works*, ed. Molesworth, Vol. VI (1840), pp. 5, 6 and 10):

P. "It is not wisdom, but authority that makes a law. Obscure also are the words *legal reason*. There is no reason in earthly creatures, but human reason. But I suppose he means, that the reason of a judge, or of all the judges together without the King, is that *summa ratio*, and the very law: *which I deny*, because none can make a law, but he that hath the legislative power. . . . . .

Lawyer. To the gravity and learning of the judges, they ought to have added in the making of laws, the authority of the King, which hath the sovereignty. . . . . .

P. It is very true, and upon this ground, if I pretend within a month or two to make myself able to perform the office of a judge, you are not to think it arrogance; for you are to allow to me, as well as to other men, my pretence to reason, which is the common law, (remember this, that I may not need again to put you in mind, that reason is the common law). . . . . .

Phil. We agree then in this, that in England it is the King, that makes the laws, whosoever pens them." . . . . .

[2] *Jurisprudence*, 6 ed., p. 9 f. What should we think of the definition of a medicine as a drug prescribed by a doctor? But though

the acts of the judges to be applications or derivations of the Sovereign's commands. And so they are—from a formal point of view. In order to get rid of the difficulty, one has to introduce the material point of view by the side of the formal: courts of law apply the law laid down by legislators, who are either Sovereign or empowered by the Sovereign, but they also administer justice,[1] that is, they consider conflicting claims in their substance and make use of their powers of formulation and application to supply gaps, to prevent miscarriages of justice, to remove crying abuses, to make way for urgent claims.[2]

And what the judges are certainly doing in the restricted sphere left open for their action, is at the bottom of the legislator's action in framing rules, although the latter are prospective while decisions are retrospective. This being so, jurisprudence cannot disregard the material aim of law without distorting one of its fundamental characters—the tendency towards justice, and substituting for it a mere reference to the machinery created for the attainment of this aim. Even from the technical point of view such a treatment would be inadequate as positive law does take cognizance of public utility, morality (*Gute Sitten*), good faith, etc. I should like in this connection to refer to the discussion of the methods of judicial interpretation carried on recently by French jurists: starting from the firmly formulated law of the Code Napoléon, the leading representatives of French legal thought urge the necessity of considering social aims for the purpose of the technical application of law and denounce the purely logical treatment of juridical problems.[3]

It is clear, therefore, that the Austinian definition

such a sweeping substitution of "wisdom" for authority cannot be justified, it is suggested by the sound feeling that law exists for the administration of justice and may be evolved from it.

Cf. GRAY, *The Nature and Sources of the Law* (New York, 1909).

[1] MERKEL, *Jurist. Encyclopädie*, § 14.

[2] DICEY, *Law and Public Opinion in England*, pp. 374 ff.

[3] GÉNY, *Méthode d'interprétation*. THALLER, GÉNY and others, *L'œuvre de R. Saleilles*.

Definition of law.

of law [1] is inadequate and incomplete. *Laws* may be commands of the Sovereign in a formal sense, but *law* is not the aggregate of such commands but the aggregate of all rules directed towards ensuring order in the commonwealth, whether these rules are made by legislators, laid down by judges in their administration of justice or worked out by customary practice. *Law* exists for the sake of order, while *right* is essentially the measure of *power*. Hence an adequate definition of law is bound to reckon with the concepts of order and power.[2]

This expansion of the formal definition is obviously connected with the necessity of giving an account of the material aim of law. Order in the commonwealth has to be ensured by delimitation between the wills and interests of its individual members, a delimitation designated in ordinary speech by the term *justice,* while the share of interest and power claimed by the Commonwealth or the Sovereign in the legal arrangement takes into account the element of *public policy*. It is unnecessary to pledge ourselves to any particular form of rival theory in order to recognize that in one way or another room must be found in analytical jurisprudence for these conceptions, that the Austinian definition of law fails to account for them and that it is illogical to reintroduce them by the back door of positive morality.

Sanctions.

The barrenness of the rationalistic method is equally apparent when we analyse the teaching as to compulsion. Laws are formulated in order to be enforced: so much is perfectly true. But is the sanction of law to be always sought in coercion by the Sovereign? [3] We have seen that such coercion is in any case not the ultimate guarantee of legal order: it requires to be supplemented by the express or tacit acceptance and assistance of society at large, be-

1 AUSTIN, *op. cit.*, pp. 88 ff., 98.

2 Cf. VINOGRADOFF, *Common Sense in Law*, pp. 49 ff.

3 Besides direct coercion, law recognizes the sanction of *nullity*, which prevents people from drawing legal consequences from illegal acts. This kind of sanction operates in theory against members of the government as well as against subjects. But its practical importance depends entirely on social support.

cause, as has been said long ago, one can conquer by bayonets but one cannot sit on them. The hangman, the policeman and the soldier would not be strong enough to ensure social order and obedience to law for any length of time if the people at large were not disposed to back them.

Besides, supposing private individuals could be coerced to obey the law, could the government be compelled to obey it? Are we to agree with those who maintain that the will of a government representing sovereign power cannot be bound by law? Austin's position leads to this view, which was expressly discussed and accepted by Hobbes. It certainly does not constitute a satisfactory solution, however, because it collides with the existence of Constitutional Law, a necessary part of the legal order in civilized countries. In order to avoid the conflict, the theorists of coercion by the Sovereign are driven to maintain that Constitutions are arrangements of government adopted by the Sovereign for considerations of expediency, but lacking the essential character of legal obligation as regards the Sovereign himself.[1]

This plea of "confession and avoidance" can hardly be considered to have settled the difficulty, because although it very properly draws a distinction between government and the Sovereign, it cannot be asserted as a general principle that a Sovereign, even though he is free to alter constitutional laws, can disregard or infringe them at pleasure. The theoretical solution is not far to seek, as it corresponds with common-sense observation of what takes place in practice. Constitutional law creates obligations in the same way as private law, but its *sanctions,* as to persons possessed of political power, are extra-legal: revolution, active and passive resistance, the pressure of public opinion.[2] The sanction is derived from the threat of these consequences.

The ultimate appeal to social forces in the background is more strongly accentuated than in private law. And this is still more true of international law, which is en-

[1] SPINOZA, *Tractatus Theologico-politicus* (Hamburg, 1670), ch v, p. 60; ch. xvii, p. 178 ff.; AUSTIN, *Province of Jurisprudence.*

[2] BINDING, *Die Normen und ihre Übertretung* (1890).

tirely formulated by agreement. Formally it is an agreement between Sovereign States, and therefore the parties are, according to the Austinian view, not to be bound by *legal obligation* to the Agreement. As there is no compelling sanction derived from superior authority, the rules of so-called International Law would be rules of positive morality.[1]

Such a conclusion is, however, not forced on us, if we recognize that rules may be statements of law even when their enforcement depends on extra-legal sanctions. We need not regard the treaty guaranteeing the neutrality of Belgium as a "scrap of paper" conditioned by the sense of expediency on the part of Prussia and other Sovereign States. We may deplore the "imperfect" effect of an obligation devoid of the sanction of superior force, but this need not prevent us from insisting on the legal character of a principle recognized by a solemn agreement between parties.

Sovereignty.

The third fundamental principle of rationalistic jurisprudence is the notion of Sovereignty. Here again matters are simplified to such an extreme extent that the principle becomes unworkable. The Sovereign is defined as the person or persons wielding supreme power in the State.[2]

Two objections have to be urged in this respect. In our days of complicated political organization, it is not easy to distribute the members of a commonwealth into the two classes of rulers and ruled and to ascertain who wields supreme power in the State and who is in the habit of obeying commands.[3] In the case of the United States, for instance, it is certainly not the President or Congress who can assume the prerogative of Sovereignty. This prerogative may be attributed to a constitutional convention while it is in being, but what of the normal state of affairs when such a convention is not in being? Have we to say

1 HOLLAND, *Jurisprudence*, p. 380.
2 AUSTIN, *op. cit.*, I, pp. 226 ff., 236 ff.
3 DICEY draws a distinction between political and legal sovereignty, but it is evident that legal sovereignty, in so far as it is not a fiction (as in the triad—King, Lords and Commons), is derived from the political balance of power.

that the Sovereign in the United States is the people? This has been said not only by theorists, but by the United States themselves: "We, the people of the United States, etc." If this formula has a meaning, the quality of Sovereignty should be attributed not to any person or group of persons supreme in the State, but to a social entity—the people organized by a historical process into a commonwealth.

The second objection concerns the idea of finality of decision involved in the principle of Sovereignty. Such finality implies not only uncontested, but undivided power. But again there are numerous Federated States in the world in which Sovereign power is distributed in one way or another between the compound elements. Each State of the North American Federation or in the Commonwealth of Australia possesses a guaranteed share of Sovereign power, and the Union superior to all these fractional authorities is not a physical Sovereign in any sense, but an entity of Public Law supported, as we saw in the case of the War of Secession, by a possible appeal to extra-legal coercion by the people, that is, by society at large. Indeed, cases are conceivable, and have been actually observed, when political power within the State was divided not on the lines of local concentration, but on those of functional differentiation. This has often taken place in the shape of an opposition between Church and State; both are powerful centres of political attraction, and it has not always been the case that the secular government has succeeded in obtaining the final supremacy. *Imperium* and *Sacerdotium* did not only struggle with each other in the mediæval world, but had to combine in various ways, even in Protestant countries. The cross-influences of the Parliament and of the Kirk in Scotland led to a most curious constitutional compromise between the two powers, which stood the trial of some sixteen years wear and tear.[1]

It cannot be said that such experiments are the best means of arranging political society, but they show at any rate that the notion of Sovereignty ought not to be taken as

[1] DICEY, in *Scottish Historical Review*, XIV, No. 55.

an absolute principle, but as a generalization subject to various contingencies.

Altogether, critical examination of the results obtained by rationalistic jurisprudence reveals the fact that its solid achievements consist in the analysis of certain formal conceptions of positive law. It helps to explain the working of the machinery by which the legislative power puts the rules decreed by it into operation by means of Courts of Law and of the police. It does not solve the problems of the origin of legal rules and of their relation to the life of society.

CHAPTER VI

THE NATIONALISTS

Events and theories.

A REMARKABLE feature in the formation of social and legal doctrines is the fact that the principal schools of thought arise and displace one another under the influence of actual changes in world politics, as though the material struggle for power or property was reflected in the consciousness of thinkers and contributed substantially to produce change in the orientation of thought. The interdependence between the two courses of development may also be considered in the light of a verification of ideals by their practical consequences. Although ideals and arguments follow their own dialectical sequence, whenever they are put into practice, their practical consequences claim a place in the process, and this place is likely to be important indeed. Thus in the eighteenth century the irritation caused by obsolete feudalism contributed powerfully to produce rationalism, more particularly rationalistic politics and a rationalistic jurisprudence. On the other hand, the reaction against the idea that State and Law can be deliberately changed according to considerations of pure reason was reflected in the world of thought by a renewed reverence for the irrational, the unconscious and the subconscious elements of human nature and social life—for feeling, instinct, imagination, tradition and mysticism.

The disillusionment brought about by the excesses of the French Revolution obscured for a time the historical significance of the upheaval and brought discredit on the cult of reason as preached by the Terrorists.[1]

[1] WORDSWORTH'S *Prelude*, XIII, 20 ff.:

I have been taught to reverence a power
That is the visible quality and shape
And image of right reason; that matures
Her processes by steadfast laws; gives birth

The invasion of progressive militarism as represented by Napoleon's Empire was stemmed by the unexpected vitality of backward nations like the Russians, the Spaniards, the Tyrolese, by the tenacity of the British oligarchical *régime,* by the irrational revival of religion in France and of patriotism in Germany. A tide of romantic reaction set in towards a restoration of organic ties broken by the sacrilegious violence of rationalistic reformers.[1]

> To no impatient or fallacious hopes,
> No heat of passion or excessive zeal,
> No vain conceits; provokes to no quick turns
> Of self-applauding intellect; but trains
> To meekness, and exalts by humble faith;
> Holds up before the mind intoxicate
> With present objects, and the busy dance
> Of things that pass away, a temperate show
> Of objects that endure; and by this course
> Disposes her, when over-fondly set
> On throwing off incumbrances, to seek
> In man, and in the frame of social life,
> Whate'er there is desirable and good
> Of kindred permanence, unchanged in form
> And function, or, through strict vicissitude
> Of life and death, revolving.

XIII, 58 ff.:

> The promise of the present time retired
> Into its true proportion; sanguine schemes,
> Ambitious projects, pleased me less; I sought
> For present good in life's familiar face,
> And built thereon my hopes of good to come.
>
> With settling judgments now of what would last
> And what would disappear; prepared to find
> Presumption, folly, madness, in the men
> Who thrust themselves upon the passive world
> As Rulers of the world; to see in these,
> Even when public welfare is their aim,
> Plans without thought or built on theories
> Vague and unsound, etc.

[1] LANDSBERG, "Pamphlet of 1830," *Geschichte der deutschen Rechtswissenschaft* (3rd Abt.), p. 101: ". . . the nineteenth century, begun with events of far-reaching consequences, and bowed down under the load of foreign oppression; newly awakened patriotism, raised to the pitch of enthusiasm, a higher sense of religion, the longing for national independence and for a state of social life built upon loyalty and religion, and finally the conviction that a philoso-

The Romantic Revival.

The literature of all the nations of Europe bears witness to the ardour and the creative force of the Romantic revival.[1]

The movement did not exhaust itself in efforts of imagination and mystic sentiment. It led to momentous results in the world of philosophical speculation and scientific method. Schelling tried to reconcile the two polar tendencies of the world—nature and thought—in his synthesis of identity. Hegel constructed a system with a similar object, but with much greater success. It is not our task to estimate the exact shares contributed by Rationalism and by the Romantic revival to his stupendous synthesis. It is sufficient to notice the necessary connection of Hegel's teaching with the new meaning acquired by history. The idea of the evolution of the Spirit in the world, which forms the key to Hegel's system, requires an embodiment in a historical sequence which has to take account of historical realities in their organic development: it substitutes the "cunning" of a Providence which operates through men's passions and strivings for the naïve schemes of deliberate arrangement propounded by rationalist thinkers and reformers.[2]

In the domain of positive knowledge the path of the Romantic movement is marked by the rise of a science of language, of comparative folk-lore, of the history of religion. The unity of these branches of study is perhaps best exemplified by the stupendous work of Jacob Grimm for the national self-discovery of the German people.[3]

Cultural consciousness assumed in its various branches the shape of schemes of universal scientific value and

phizing charlatanism in law and politics was exercising a pernicious influence, fixed the eyes of all patriots upon the old times of German strength and independence, and produced eager research in history which extended to all branches of scholarship; at times it produced over-estimation of the Middle Ages, mysticism and political fanaticism, but in the main it laid the foundation of new life in art and science and inaugurated a definite stage in the progress of the human mind We owe the school of historical jurisprudence also to this movement."

[1] HAYM, *Die romantische Schule;* BRANDES, *Hovedströmninger i Litteraturen af det XIX Aarhundrede,* II.

[2] CROCE, *Filosofia della Pratica,* pp. 319, 401.

[3] LANDSBERG, *op. cit.,* III, pp. 2, 114 ff.

acquired a firm basis in appropriate technical methods. Comparative philology became the leading science of the group, revealing as it does the marvellous interplay of *individual* invention and *collective* thought, of logical categories, physiological factors and psychological peculiarities, of tradition and progress.

All these investigations were equally inspired by the belief in the expansion of personal life in the shape of a wider national consciousness requiring a psychology of its own.[1]

The Historical spirit.

Such is the background against which stands out the rise of historical jurisprudence. In Italy the genius of Vico had discovered some of the main features of the organic process in history almost a century before they could be discovered by any one else.[2]

In England the protest against a reckless reshuffling of State and of law was sounded in clarion notes by Burke.[3]

In France the reaction in favour of history found a remarkable expression in St. Simon and his school.[4]

[1] PAUL, *Prinzipien der Sprachwissenschaft*.

[2] CROCE, *The Philosophy of Vico* (Eng. transl. by Collingwood 1913), p. 119: "Poetry, which ought to represent sense, and nothing else, came to represent sense already intellectualized . . . Barbaric civilization became a kind of mythological, allegorical representation of the ideal phase of poetry, and primitive tribes were transformed into 'crowds of sublime poets,' just as in the ontogenesis corresponding to this phylogenesis children had been made into poets"

[3] MORLEY, *Burke* (1879), p. 165: "To him [Burke] there actually was an element of mystery in the cohesion of men in societies, in political obedience, in the sanctity of contract; in all that fabric of law and charter and obligation, whether written or unwritten, which is the sheltering bulwark between civilization and barbarism. When reason and history had contributed all that they could to the explanation, it seemed to him as if the vital force, the secret of organization, the binding framework, must still come from the impenetrable regions beyond reasoning and beyond history."

[4] MICHEL, *L'idée de l'Etat*, pp. 187 ff. ST. SIMON, *Œuvres choisis*, I, pp. 146, 149. On *Le Play*, MICHEL, *op. cit.* pp. 529 ff. MORLEY, *Burke* (1867), p. 283: "Comte again points impressively to the Revolution as the period which illustrates more decisively than another the peril of confounding the two great functions of speculation and political action: and he speaks with just reprobation of the preposterous idea in the philosophic politicians of the epoch, that society was at their disposal, independent of its past development, devoid of any inherent impulse, and easily capable of being morally regenerated by the mere modification of legislative rules."

The Historical School of Law.

It was in Germany, however, that the Romantic movement in political thought crystallized in its most influential form. It is represented mainly by the "Historical School of Law" initiated by Savigny.[1] The story of the literary conflict that led to the distinct formulation of its tenets has been told innumerable times. A proposal by a distinguished professor of Civil Law, Thibaut of Göttingen, to proceed to a general codification of the statutes and customs of the various German States in a logically coherent system on the pattern of Roman jurisprudence and of the Civil Code of France, called forth an indignant reply from Savigny, in which he contended that Law is as much a part of national inheritance as language or religion, that it cannot be treated as dead material to be cast and recast by professional jurists and statesmen according to their view of what is reasonable. The ground for codification had to be prepared by a careful study of national traditions and requirements as regards law. This conflict between prominent representatives of rationalistic and of historical conceptions of jurisprudence gave rise to a rapid concentration of interests and capacities for the purpose of the historical study of law. The directing principles of the new school were well represented by a new periodical publication, the *Review of Legal History*,[2] started by Savigny, Eichhorn and their friends. The programme of the school was as set forth in the first number: it distinguished two principal groups of juridical views and methods: the historical and the non-historical. The latter may lay the greater stress either upon philosophy and the law of nature or upon so-called common sense. It takes the view that each period has an existence and a world of its own, and therefore produces its own laws independently and arbitrarily out of its own

[1] We need not discuss the claims of Hugo to rank as the pioneer of the Historical School of Law. He was a precursor of Savigny as to method, but he did not achieve or contemplate the organization of legal knowledge characteristic of the *School*. Cf. LANDSBERG, III, 2, pp. 47 ff.

[2] *Zeitschrift für Rechtsgeschichte*.

insight and strength. History can only serve as a moral and political collection of precedents.

"The historical school on the other hand starts from the conviction that there is no perfectly detached and isolated stage of human existence. The present existence of every individual and that of the State develops with immanent necessity from elements furnished by the past. There is no question of choice between good and bad, in the sense that the approval of a given thing could be called good, the rejection bad, but that the latter was nevertheless possible.

Rejection of what is given is, strictly speaking, an impossibility; we are inevitably dominated by it, and we can only err in our judgment, but not change the fact itself.

The non-historical school holds that law is produced on the spur of the moment and in an arbitrary manner by those invested with the powers of law-making, independently of the course of law in past times, and purely according to the best of the convictions arising at the moment."

National conceptions of right.

The new departure was bound to lead to the reconsideration of the main position of jurisprudence as understood by the rationalists. Law was considered primarily not in its formal aspect as the command of a sovereign, but in its material content as the opinion of the country on matters of right and justice (*Rechtsüberzeugung*).

Instead of being traced to the deliberate will of the legislator, its formation was assigned to the gradual working of customs, the proper function of legislation being limited to the declaration of an existing State of legal consciousness, and not as the creation of new rules by individual minds. As regards the State, law was assumed to be an antecedent condition, not a consequence of its activity. In this way direct legislation was thrust into the background, while customary law was studied with particular interest and regarded as the genuine manifestation of popular consciousness.

Curiously enough, the historical school of law was confronted from the very outset by an awkward problem of Ger-

man legal history; if law was a spontaneous manifestation of the national mind, how could it have happened that the German people had renounced a great part of its vernacular rules and customs in favour of the Corpus Juris of the late Roman Empire, compiled on foreign soil to meet conditions of social life entirely different from those obtaining in Germany? The founder of the "Historical School," Savigny, attacked the problem himself in his monumental work on Roman Law in the Middle Ages. He did not reach the critical period of "reception" in the fifteenth century, but his treatment of the previous epochs shows that in his view there was no break of continuity in the development of Roman Law at any time between the fall of the Western Empire and the rejuvenation of the Corpus Juris in the fifteenth century; the connecting threads are to be found in the transformation of Roman legal sources and rules by a process of "vulgarization" similar to that which led to the formation of Romance languages—Italian, French, Spanish—on the one hand, and a slow revival of legal learning in the Law Schools on the other.[1]

This investigation of the preliminaries of *reception* was not sufficient to explain the wholesale intrusion of Roman doctrines and of professional civilians in a field which had been cultivated for ages by the popular tribunals of the *Schöffen* and made to yield a harvest of Germanistic conceptions and rules. The question was treated from all sides by later writers, who dwelt on the antagonism between public and professional opinion in this respect and, though recognizing the value of certain improvements in technical matters and the helplessness of dispersed local customs before the unified body of the "Common Law of Rome" as practised in Germany (*Das Gemeine römische Recht*), insisted on the necessity of healing the grievous wound inflicted on the German people by the introduction of a body of foreign law.[2] The controversy was by no means confined to learned dissertations on the subject, but the conflict between Romanistic and Germanistic views

[1] Cf. VINOGRADOFF, *Roman Law in Mediæval Europe.*
[2] Cf. HÜBNER, *Grundzüge des deutschen Privatrechts.*

materialized into a struggle between their representatives in connection with a task of immense practical value—the drawing up of the Civil Code of the German Empire (*Bürgerliches Gesetzbuch*) which came into force on January 1, 1900. The first commission to which the elaboration of the Code had been entrusted, worked under the prevailing influence of Romanistic jurists, with Windscheid at their head. The result of their labours proved to be an adaptation of "Pandekten" learning to the conditions of modern Germany. It provoked a storm of indignation on the part of the "Germanists."

Conflict between Romanists and Germanists.

Beseler had already called attention pointedly to a contrast between popular law and lawyer's law. Now Gierke took up the cudgels against Windscheid and his followers and formulated many concepts which in his view were in contradiction to the historically recorded views of the German people.[1]

These protests received wide support, and led to the formation of a second commission which considerably revised the work of the first and concluded its labours by the preparation of the Code in its present shape.

The importance of this episode in the history of modern law-making can hardly be exaggerated. It shows to what extent theory and practice are intertwined in these matters. It shows also that the foundations laid by the "historical school of law" in Romantic surroundings were by no means obliterated by later developments, but have survived in certain respects up to our own times. This is only natural, as actual schools of thought cannot be separated by a clean cut one from another, but necessarily overlap the borders of the doctrinal changes of principles.

v. Gierke.

In fact, the champion of Germanistic codification, Gierke, stands altogether as a representative of the tradition of the "Historical School of Law" in its more recent and improved aspect. His staunch patriotism is both the reason and the consequence of his adherence to the standard of

[1] P. Vinogradoff, Introduction to the American translation of R. Hübner's *Grundzüge des deutschen Privatrechts.*

national consciousness as regards legal institutions and rules. In all his works he tries to bring into strong relief juridical ideas which he considers to be peculiar to the Teutonic race or, in a more narrow sense, to the German people.[1]

An especially important case is presented by his theory of "associative" development.[2]

From the point of view of Roman Law such an entity as a town corporation is not a real person but a legal fiction adopted for practical purposes, while from the Germanistic point of view it is as much a reality as property. The "association theory" (*Genossenschaftstheorie*) in the ultimate form given by Gierke, showed that the two Roman categories of *universitas* and *societas* do not make intelligible the types produced by the Germanic law of association. It set in their place, by the side of corporate association, Germanistic "communities of collective hand," and pointed decisively toward the conclusion that the collective person possessed an actual existence in all the forms in which it was manifested. It has sharpened our

[1] SALEILLES, *Introduction au droit civil allemand*, 28 ff.

[2] O. v. GIERKE, *Das Wesen der menschlichen Verbände*, p. 21: "We deduce the existence of actively influential social ties uniting us, first of all from outer experience. Observation of those social events among which we pass our lives, and still more the study of the history of mankind, show that nations and other communities themselves shape the world of circumstances which lend them power and produce material and spiritual culture. All this is effected by individuals, because the communities are composed of individuals. But individuals, in so far as their doings concern the community, are determined in their actions by physical and spiritual influences which spring from the ties that bind them together."

p. 22: "What outer experience teaches us is confirmed by inner experience, because the reality of the social life of the community exists also in our consciousness. It is an inner experience for us to find the place for our Ego in a highly developed social life. We feel ourselves to be self-contained units, but we also feel that we are part of a whole which lives and acts within us. Take away our relation to nation and State, to religious bodies or churches, to profession and family and all kinds of unions and guilds, and we should not know ourselves in the miserable remnant that would remain. When we realize this, we understand that all these things do not mean mere chains and bonds for us, but that they represent a psychic chain of experiences affecting our innermost life and forming an integral part of our being. We become conscious of the fact that part of the impulses directing our actions emanates from the sense of community in us, and that we are living the life of social beings."

discernment of the fact that juridical persons, even though not apparent to our sight, share this lack of physical existence with all other juridical facts and concepts. As we nevertheless ascribe reality to property or to an obligation, so too the State, the commune, the society (*Verein*), the endowment (*Stiftung*), are something real, not merely fictitious. If this realistic theory be adopted it is bound to lead to consequences which are not compatible with the adoption of the Roman point of view, for the corporation will, e.g., become responsible in the same way as physical persons in actions of tort: though malice cannot be attributed to a fictitious entity, it may, of course, influence the conduct of unions of live beings. Again, in Roman Law the property of the association is quite distinct from that of the members, but in the realistic conception—which, e.g., is very clear in regard to gilds—there can be no clear division between fictitious and ordinary property, and the rights of the members extend to the property of the craft as such. The gild-chamber, the gild furniture, the capital accumulated by contributions, entrance fees, penalties and gifts, served not only the ends of the association, but also the economic, social and other purposes of the members. Every associate might, for example, use the gild house for his convivial pleasures, each could demand support or loans from the capital of the gild, and so on. These benefits were not, however, indispensable to the gild members in the same way as the use of the "commons" was to the members of the "Mark"; the gild property was devoted in a far greater degree to the whole body as such. From the beginning, the entire body of gild members stood opposed to the individual in a far more pronounced manner than was originally the case in *Mark* associations; and this is explained by the fact that there was not in the case of the crafts, as there was in the case of rural communities, a complete coincidence of the purpose of the group with the aims of its members. The craft was not designed to further merely the interests of individuals,—it was precisely in the older period that it had to serve the interests of the association, the city, and the purchasing public.

Thus a moral person is in no way a fictitious being devised by lawyers in order to facilitate certain business operations: it is a real union, or a unit, in the sense that its existence and functions form a necessary part of the life of the group of live persons who are joined as its members. A craft-gild, a city, a State, are real beings, who live in the life of their members, possess a distinct consciousness and a common will, although their existence stretches over generations and is not interrupted by the disappearance of particular individuals included in it or by the appearance of others. This being so, the moral person is not only a necessary complement to the individual lives concerned, but it ought to be subjected to all the consequences of the notion of real personality.

All these features are attributed to the "real" corporation on the strength of a Germanistic tendency, although it is claimed at the same time that the interpretation of the juridical person has a basis in the nature of man and of society.[1]

Ihering's criticism and new departure.

The work of the "Historical School of Law" has not been done in vain, and later developments did not simply wipe it off the slate. If the rationalistic schools had cleared up the logical connection between the formal principles of positive law, the Historical School and the Romantic movement have established once for all the view of the organic growth of institutions and rules and have substituted for the rationalistic conceptions of the period of enlightenment a wider view of individual and social psychology. But the mystic nationalism of the Romantic theory has not stood the test of critical examination and of scientific progress. Nations are live beings in a certain sense, but not in the same sense as individuals: they are not circumscribed to the same extent in their development by unyielding forms, they react more freely against circumstances and command a wider range of adaptation. Tradition is a powerful factor in their life, but so is progress. The actual course of European history did not remain under the law of reaction and

[1] R. Saleilles, *La personalité juridique* (1910), *passim*, especially p. 607.

conservatism: after taking a rest for a generation or two, it started again on the track of reforms and change. In the special field of jurisprudence we have already noticed some of the deficiencies of a rigidly nationalistic doctrine. But the best way of realizing the limitations of the Historical School of Law is to listen to the words of one who himself began as an adherent of the school, but eventually struck out a line of his own—I mean Ihering. No one was better qualified to appreciate the value of a historical study of the factors influencing law, than the author of the *Spirit of Roman Law*. But he felt more and more that the progress of law is not merely the result of an unconscious growth conditioned by innate character and by environment, but also the result of conscious endeavours to solve the problems of social existence. More perhaps than any other form of human activity, law is directed towards aims; it receives its orientation not only from the past but from the future. It may miss the mark or attain its objects in particular matters, but it is prospective and a function of consciousness in its very essence.[1]

This leading idea has played a part in the subsequent development of jurisprudence, and we shall have to revert to it by and by: at present it will help us to understand why the teaching of the Historical School of Law had to give way before new methods.

[1] IHERING, *Geist des römischen Rechts*, III, p. 296: "Juridical principles . . . are not merely logical categories, but forms for the concentration of material rules, and rules change with conditions."

CHAPTER VII

THE EVOLUTIONISTS

Darwinism.

No event in the history of scientific thought has had a greater influence in shaping the habits of mind of researchers and philosophers than the rise of Darwinism. The biological view of evolution focussed in that expression has come to dominate not only natural science, but also the study of man and of society.

The decisive feature of the Darwinian synthesis was the application of biological evolution to animal species; a further step led to the application to social groups of his views of the struggle for existence, of the survival of the fittest, of the processes of selection, of adaptation by heredity, of the unity of organic life. It has given a rude shock to many time-honoured prejudices and has naturally called forth fierce opposition. By the side of the supporters of confessional dogmas appeared idealists who believed that the spread of a doctrine starting from a biological basis endangered the dignity of man and the value of his creative power.[1]

Some of the shafts directed against Darwinian views struck home, but they reached only the more rash among his followers, who had come to regard the biological formulæ as rules of thumb fit for automatic application to all problems of history, ethics or social science.

Such pruning of the branches did not, however, harm the roots in any way. The main principles of the movement have proved a most potent ferment in the development of social studies. Three ideas emerge as especially powerful in this respect: the idea of gradual adaptation to circumstances, the idea of a continuous connection between the lowest and the highest forms of animal and human life,

[1] MERZ, *History of European Thought*, II, 624; III, 394 ff.

and the idea of a transformation of individual faculties through the life of social groups. In their combined effect these three leading ideas constitute the mainstay of the doctrine of evolution which has set its stamp on the scientific thought of the last seventy years. Needless to add, neither the special biological tenets nor the general views which accompany them were entirely and exclusively the personal products of Darwin's genius: their greatness and fruitfulness depend, of course, on the fact that they focus the strivings and intuitions of a whole period of scientific thought.

Teleological evolution in Law.

A saying of Ihering's may be taken as the appropriate epigraph to the Evolutionist movement in Social Science: "Law is not less a product of history than handicraft, naval construction, technical skill: as Nature did not provide Adam's soul with a ready-made conception of a kettle, of a ship or of a steamer, even so she has not presented him with property, marriage, binding contracts, the State. And the same may be said of all moral rules. . . . The whole moral order is a product of history, or, to put it more definitely, of the striving towards ends, of the untiring activity and work of human reason tending to satisfy wants and to provide against difficulties."[1]

The teleology of the legal process is underlined in these words by the side of its causality, and the fact that law is striving consciously to achieve social aims makes its study particularly interesting from an evolutionary point of view. To be sure, political and jurisprudential changes often lead to unforeseen results—witness the frequent cases when the excess of discipline has produced outbreaks of anarchy—but, apart from such cases of "heterogeneity" the effect of laws consists to a large extent in adaptation to conditions. Both invention and tradition play characteristic parts in this process.

Anthropology and prehistoric archaeology.

In the long history of civilization the first steps are in many respects the most decisive. Indeed, the proper expression would be "early stages" rather than first steps:

[1] IHERING, *Zweck im Recht*, II, p. 112.

when first steps were made, there was as yet no one to record them and to reflect on them, and the scanty material remnants of prehistoric archæology hardly justify the sweeping theories which have sometimes been constructed in accounting for them.

Nor has the study of savage races led to the discovery of primitive tribes immediately related to the higher apes which are supposed to be our nearest cousins among animals.

Yet, though even the most rudimentary forms of culture known to us are very complex and replete with various accomplishments, we are justified in considering them at early stages and in tracing the incipient forms of social organization and law in their arrangements. These cultural origins supply us not only with simpler combinations and more clearly defined natural conditions, but they possess the inestimable advantage of presenting themselves in a very great number of instances and varieties which shade off one into the other and offer welcome opportunities for comparative investigation. This is so much the case, that comparative jurisprudence has almost become synonymous with a study of primitive societies, although, of course, such a connotation is by no means rendered necessary by the aim of the study.[1]

Maine.

The attention of students was directed towards this "anthropological" origin in many centres at the same time. The atmosphere of social studies was literally charged in the second half of the nineteenth century with anthropological inquiries. It is sufficient to mention Bachofen's investigations on mother-right, Morgan's on classificatory

[1] VINOGRADOFF in the *Enc. Brit.* on *Comparative Jurisprudence;* THALLER, GÉNY and others, *L'œuvre juridique de R. Saleilles,* p. 108: "In short, it [comparative jurisprudence] will provide the jurisconsult with an entirely new field of observation, which will permit him to prove the value and the solidity of national constructions, to modify them, and even to make innovations among them, provided that the latter are in harmony with the body of internal law and do not interfere with its economy. If the result of the teaching of comparative law is that the same idea explains the juridical regulation of an institution in many legislations, will not this conception be singularly fortified?"

relationship, McLennan's observation on exogamy, Bastian's ethnographic parallels. Nor were the excursions of anthropologists restricted to particular problems of social intercourse. General surveys of evolution and attempts at formulating empirical laws made their appearance by the side of innumerable monographs. Among these a most conspicuous place may be claimed for Maine's work—not only in Great Britain, but among all students of legal anthropology in Europe.

It is not necessary to dwell on the conditions which contributed to give a definite direction to Maine's thought and to his writings. As a professor of Civil Law in Oxford he acquired interest in the historical formation of the legal system of Rome and presented the main threads of Romanistic study as an example of "Ancient Law" development in an attractive and suggestive book.[1] But Maine's principal contributions to jurisprudence were those volumes on Village Communities, on Early Institutions, on Modern Custom and Ancient Law which were written after his return from India, when his thoughtful mind had been awakened to the social aspects of law in its organic processes of adaptation revealed by a comparison between such vastly different bodies of custom as those of the Indian and Germanic village communities, of Slavonic joint families, of the clans and clientships of the Celts. In point of method Maine presented the greatest possible contrast with the abstract rationalism of Austin's analysis: he expressed his disagreement with the latter in a remarkable section of his book on Early Institutions.[2] As regards the Romantic school, he never took occasion to state an opinion, though the influence of Savigny may be clearly perceived in the book on *Ancient Law;* his method became, however, differentiated from that of the "Historical School of Law" in his later writings. No stronger contrast could be imagined than his treatment of Communities and that of Gierke: while the latter insists on the Germanistic

[1] Cf. VINOGRADOFF, *The Teaching of Sir Henry Maine.*
[2] *Early History of Institutions* (1875), pp. 345 ff.

peculiarities of the Mark and of the craft-gild, Maine uses v. Maurer's materials in order to impress on his readers the idea of a constantly-recurring combination which is no more German in essence than it is Indian or Slavonic, a combination produced by an undeveloped sense of individual right and natural union among the members of a village settlement. His interpretation of the evidence may be right or wrong, but it is certainly not the part played by the nationalistic element which he wants to emphasize, but the similarity in the methods of husbandry and land-tenure employed by different nationalities in similar conditions. Maine had a great following among continental writers—M. Kovalevsky, for instance, showed his adherence to Maine's views by the very title of his best book.[1]

Spread of anthropological jurisprudence.

Other students took up the same task without standing in direct connection with the British writer. R. Dareste[2] may be mentioned on account of his excellent sketches of legal customs and institutions from all parts of the world. Post[3] gathered an enormous mass of material from the life of savage and barbarian tribes.

J. Kohler, besides writing copiously himself on comparative law on anthropological lines, has formed an important centre of study in his Review of Comparative Jurisprudence.[4]

One feature of these works illustrating the natural history of legal customs and rules by comparison and analogy has been the attempt to formulate generalizations as to normal sequences of development, or what may be called empirical laws of jurisprudence. We read, for instance, in Maine's *Ancient Law* that the course of this development proceeds from status to contract.[5] A favourite scheme of social evolution starts with sexual promiscuity in the earliest stage, and marks the advance from anarchy to the horde, then to the clan, then to the family household which

[1] *Coutume contemporaine et ancienne loi* (1896).
[2] *Études de l'histoire du droit* (1882), *Nouvelles études* (1902, 1906).
[3] *Afrikanische Jurisprudenz*, etc.
[4] *Zeitschrift für vergleichende Rechtswissenschaft.*
[5] *Ancient Law*, ch. v.

itself is constructed first on polygamic and later on monogamic lines. From an economic point of view the commonly accepted sequence of stages consists in the transition from a society of hunters and fishers, to a nomad pastoral organization, then to an industrial and commercial, ultimately to capitalistic intercourse.[1]

These references may be sufficient to show on what broad lines comparative study has been carried out and from what different points of view legal problems have been approached by it. Marriage, husbandry, crime and punishment, succession, possession and contract have all been treated by the anthropological school as devices to meet varying social conditions, and the relative character of the solutions obtained has been as much to the fore as the analogies in the treatment of similar problems by nations and tribes situated in very different surroundings.

Sociological orientation. Ihering.

The work of the anthropological school as regards law has been largely descriptive and carried on rather in width than in depth. It was supplemented by another line of inquiry, akin to the former one in its premises and aims, but altogether different in technical method. I mean the *sociological* treatment of legal facts that became usual in the second half of the nineteenth century. The apostle of the sociological creed, A. Comte, did not pay much attention to law; it was absorbed for him in the general course of historical development.[2]

Spencer was led by his studies in descriptive sociology to consider customary rules and institutions among the materials for empirical generalization,[3] and his determined attitude in the controversy between the State and the individual made it necessary to formulate views as to the direction of social evolution ("the coming slavery"). But these fragmentary surveys do not count seriously in the history of juridical thought. An important departure was made, on the other hand, by Ihering. In his earlier writings he had

[1] K. BÜCHER, *Entwickelung der Volkswirtschaft* (1904), pp. 45, 54.
[2] *Cours de philosophie positive*, IV, pp. 275-282; MICHEL, *op. cit.*, pp. 447, 448.
[3] *Principles of Sociology*.

touched on several vital problems of general jurisprudence. He had contrasted in his *Spirit of Roman Law* the technical methods of the professional lawyer with the customary, half-religious formalism and the common-sense equity of popular legal lore,[1] and he had come to the conclusion that both methods are justified in their time and place, one in the initial stages of juridical formation, the other in epochs of advanced civilization and of complex intercourse. These observations suggested a different appreciation of national and international factors in jurisprudence and positive law: while in early periods legal rules grow more or less organically, like language and myth, later stages are characterized by universal and, as it were, impersonal conceptions, which, like coins of standard value, circulate without difficulty right through the world. In the Review of dogmatic Private Law which Ihering conducted with Gerber, he gave great prominence to the special craft of the lawyer and to methods of dialectical analysis and dogmatic construction. But he insisted energetically on the social aims of juridical activity, attacked with bitter scorn the tendency towards the self-satisfied exercise of juridical logic divorced from practical needs,[2] and represented the process of legal formation as a "struggle for right" among contending individual and social claims.[3] While illustrating forcibly the value of a stubborn assertion of the concrete will, he broke with the abstract conception of the will in itself (*an und für sich*) apart from aim and motive, and substituted in his famous definition of right the protected interest for the limited will.[4]

[1] *Geist des römischen Rechts*, III, p. 302: "Let us break the charm, the illusion which holds us captive. All this cult of logic that would fain turn jurisprudence into legal mathematics is an error and arises from misunderstanding law. Life does not exist for the sake of concepts, but concepts for the sake of life. It is not logic that is entitled to exist, but what is claimed by life, by social intercourse, by the sense of justice—whether it be logically necessary or logically impossible. The Romans would have been worthy to dwell in Abdera if they had ever thought otherwise, if they had sacrificed the interests of life to the dialectic of the school."

[2] IHERING, *Scherz und Ernst in der Jurisprudenz*. See *ante*, p. 25

[3] *Kampf ums Recht*, p. 7.

[4] Cf. KORKUNOV, *Theory of Law*, transl. by Hastings.

The Aim of Law.

But Ihering's most important contribution to the general theory of law is given in his *Zweck im Recht* (the "Aim in Law"), a work which, in spite of its absence of symmetry and occasional lengthiness, presents one of the principal landmarks in the history of jurisprudence. It traces the conditions under which the individual and society co-operate in evolving rules of conduct. The governing ideas are that all human conduct being directed towards aims, these aims are bound to be determined by utility, the striving towards good and the avoidance of evil. The secret of history consists in the fact that good and evil are estimated in their values not by individuals, but by society, and that social aims are engrafted on individual consciousness by the educational action of society in fashion, in conventional rules, in moral training and ethical ideals, lastly and most effectually—in law. The history of juridical conceptions and institutions is devoted to tracing the evolution of this social education conditioned by all the varying influences of race, geographical situation, climate, economic arrangements, political organization, relations with neighbours, cross currents of religious and scientific ideas, etc., but ever tending towards a welfare achieved by social means. In the light of this orientation one comes to understand the meaning of the protest against the "Historical School of Law," a school pledged to the cult of rigid national personalities dependent on the past and barren as to the future.[1]

Juridical analysis. Jellinek.

I have already called attention to the revival of interest in juridical analysis and in juridical construction which characterizes Ihering's work. He always felt and spoke as a jurist, and did not want to exchange the sharp definitions and compelling inferences of the lawyer for the hazy descriptions and the fluid transitions of historians. This firm attitude of trained lawyers is very noticeable in

[1] LANDSBERG, *Geschichte der Rechtswissenschaft*, III, p. 816: "A juridical institution stands and falls with the achievement of its aim. It arises for the sake of aims, in the consciousness of aims, and in the struggle between aims. This is the reason why law cannot be explained either by mechanical processes or by blind growth. Its justification lies in its *ends*, as a means for their realization."

other works on sociological jurisprudence. I will select two as examples of a powerful current in the literature of the end of the nineteenth century. Jellinek's writings are devoted to problems of constitutional and administrative law. The book which immediately concerns us now is his *General Doctrine of the State* (*Allgemeine Staatslehre*); its chief aim is to ascertain the relations between political arrangements dependent on social conditions, on the one hand, and the rules which constitute the positive law of the State on the other. Apart from a valuable discussion of various theories bearing on the subject, the work is chiefly interesting on account of the light it throws on the part played by legal rules in upholding political systems.[1] It must be added, however, that the element of systematic construction predominates over the exact study of the facts in such a way as sometimes to distort the true meaning and perspective of institutions. This defect is very noticeable in the treatment of English Law, where Jellinek's rather arbitrary generalizations compare unfavourably with the masterly exposition of Dicey, derived from an intimate and profound understanding of Common Law.[2]

Modified doctrine of natural right.

Another significant current of thought connected with the evolutionist movement in jurisprudence may be seen in the revival of a modified conception of the law of nature—not in the rationalistic sense, of course, but in that of a striving towards ideals. If, as Ihering put it, law has not only to register actual rules and to explain their origin, but also to aim at the solution of social problems, it is not

[1] *Allgemeine Staatslehre* (1905), p. 47: "The doctrine of a transformation directed towards aims sheds light on the fundamental error of the view that social phenomena arise and develop by a process of organic growth We ascribe to the organic process the facts that transcend our knowledge."

p. 176: "The critical question arising in regard to all social institutions: Why do they exist—springs therefore from the essence of our reasoning faculty First and foremost it holds good with regard to the State. Why does the State with its supreme power exist? Why must the individual suffer subjection of his will to another; why and to what extent ought he to sacrifice himself to the community?"

[2] DICEY, *The Law of the Constitution*. In the work of Jellinek's pupil, HATSCHEK (*Englisches Staatsrecht*) these defects are magnified tenfold.

wrong or presumptuous to reflect on the general principles which in the present state of civilization we ought to accept as the guiding lights for legislators and reformers, and as the critical tests for approving or disapproving existing rules of positive law. The idea of constructing a sociological jurisprudence has been embodied recently in a work by Professor Eugen Ehrlich of Graz. He defines its scope in the following words: "The primary and most important task of sociological law (law on a sociological basis) is therefore to separate the component parts of the law ruling, regulating and determining human society, from mere decisions in individual cases, and to prove their organizing nature. This was recognized first in Constitutional and Administrative law. Indeed, no one doubts nowadays that State law means the organization of the State and does not exist for the purpose of settling quarrels but to define the position and tasks of the State-organs and the rights and duties of State officials. But the State is first and foremost a social union."[1] The principles of law are bound to be social in their essence.

Such principles are bound to be broad and general, but they cannot be universal and eternal: they appeal to the nature of men, not in the abstract, but as defined by circumstances. Every age will have its own ideals in this respect, although such ideals are bound to have some connection with each other. The ancient world ended by condemning slavery on the strength of the law of nature, the mediæval polity was overthrown when serfdom was condemned as being against nature, and present-day society is condemning ruthless competition as being against the law of nature. The appearance of such watchwords cannot fail to be ominous. They enlist strong sympathy when "there's something rotten in the state of Denmark." In this sense attention may be called to such works as Stammler's *Right Law* (*Das richtige Recht*) which has been hailed with approbation by many thinkers in continental countries, for example, by Saleilles, who accepted it as "a law of nature with variable contents."[2]

[1] E. Ehrlich, *Grundlegung der soziologischen Rechtswissenschaft.*
[2] Stammler, *Das richtige Recht.*

A similar idea is expressed in a suggestive volume by Saleilles' fellow-countryman Charmont.[1]

As in the case of Jellinek, the value of Stammler's book lies in the leading idea of the author and in the method advocated by him, much more than in the use he has made of his own suggestions. Instead of operating within the limits of a shifting scheme of ideals, Stammler proceeded to lay down a set of standard formulæ devised on a rationalistic pattern for all time. His four standards have no value for the advancement of juridical thought, and as for his *Theory of Law*,[2] with the pretentious epigraph "*non est mortale quod opto*," it is hardly too much to say that it is presented in such a pedantic manner that it is almost impossible to read the big volume dedicated to it, and quite impossible to make use of for any definite purpose. It had been better if the author had taken to heart the admirable precepts of his own *Right Law*.

On the whole, there can be no doubt that the idea of evolution has had a potent influence on jurisprudential studies. It has not only supplied jurists with a suggestive explanation of the sequences of changes through which all systems of positive law pass in their history, but it has indicated a proper method for estimating the course of this development: we all recognize now that law has grown by conscious efforts towards the solution of social problems conditioned by causes which spring from previous stages of development and from the influence of surroundings. At the same time, the task of unravelling the sequence of evolution in law and right lies in truth at the source of all juridical activity. Evolution in this domain means a constant struggle between two conflicting tendencies—the certainty and stability of legal systems and progress and adaptation to circumstances in order to achieve social justice.

[1] *Renaissance du droit naturel.*
[2] *Theorie der Rechtswissenschaft.*

CHAPTER VIII

MODERN TENDENCIES IN JURISPRUDENCE

Critical tendency.

RECENT developments in the domain of jurisprudence have not yet assumed a sufficiently distinctive character to entitle them to rank as a new epoch in the history of that science. Nevertheless there are certain features, common to the work of writers of the beginning of the twentieth century, which deserve attention and are likely to advance the study towards new vistas.

To begin with, we have to notice a strong critical tendency: instead of the enthusiasm called forth by the earlier instalments of comparative study, an attitude of scepticism and searching investigation has been assumed by leading writers. Jellinek, for example, has expressed great disappointment as to the results achieved by anthropologists in their comparative surveys.[1]

Even more characteristic are the critical objections of the most brilliant legal historian of modern England—F. W. Maitland. He was a decided sceptic as regards many generalizations proposed by Maine—not, however, because of any opposition to relativism. On the contrary, he fully admitted that legal as well as social and political phenomena are produced by the flow of historical circumstances, but it seemed to him that writers had been guided in their work more by their wish to prove preconceived theories than by a careful consideration of the evidence. His developed sense of historical criticism rebelled against Maine's assumptions and lack of careful investigation of sources.[2] As regards primitive kindred, for instance, Maitland lays stress on the difficulty arising from the fact that ancient Anglo-Saxon and Germanic law recognized relationship on the female as well as the male side. In his

[1] *Allgemeine Staatslehre.*
[2] *Collected Papers*, I, p. 285.

view, there can therefore be no question of grouping the corresponding societies into patriarchal clans, which stand or fall with the conception of agnatic relationship. Again, in his criticism of Maine's theory of the village community, he held that there is no evidence of original communalism. Altogether, the theory of "stages" seemed unnecessary and misleading to him; why should one assume that all nations are constituted on the same lines and reproduce the same characteristic features in their treatment of economic and social problems? For Maitland, on the contrary, nations manifest such great differences of character and intellect that some national groups would be bound to skip certain stages, which other more backward units might pass through.[1] Obviously such criticism might be directed with even greater justice against the speculations of German writers like Kohler, than against the theories of Maine.

It is, however, important to notice that Maitland's opposition challenged not the method itself, but rather the indiscriminate way in which the comparative anthropologists worked out their ideals. He did not maintain that because there were so many fallacious analogies, all recourse to analogies is unsuitable.[2]

F. W. Maitland and the comparative method

As, however, the comparative method cannot be completely discarded, Maitland himself did use it repeatedly, and, in fact, he has shown by his very attacks how the same problems may be approached by a similar road while avoiding the pitfalls into which the former votaries of the school had stumbled.[3] For instance, the development of the idea of a corporation in England was studied by him in relation to German theories, and it was for this purpose that he translated a section of Gierke's work. In his

[1] *History of English Law*, II, p. 237. *Domesday Book and Beyond*, p. 345.

[2] *Collected Papers*, II, p. 4: "Only by a comparison of our law with her sisters will some of the most remarkable traits be understood."

[3] *Op. cit.*, II, pp. 251, 312. *History of English Law*, I, pp. 486 *et seq.*; II, pp. 29-80.

analysis of kinship he protests against patriarchal theories, but goes a long way towards accepting the view of matriarchal origins of the family, etc.

The necessity for revising the comparative method is one of the lines on which modern jurisprudence has to take up the thread of investigation. Inferences must be preceded by a careful study of individual cases, and in this study juridical analysis ought to receive more attention than has been the case hitherto. This side is very poorly represented in the books on anthropological jurisprudence, which, even when written by lawyers, generally suffer from a tendency to put together things which are in reality unconnected.

The accumulation of somewhat indiscriminately collected facts like those presented by Post, Kohler, Kovalevsky, etc., had its justification in the necessity of preliminary surveys on broad lines. What is wanted now is to take our stand on the careful analysis of one or the other rule, relation or institution, as illustrated in its formation, development and decay by the facts of comparative jurisprudence. Steinmetz's monograph on crime and punishment in primitive society may serve as an example of the proper application of such a method.[1]

The social crisis.

By the side of the critical tendency, there are signs of the appearance of a new *constructive* point of view. It is suggested forcibly by the great social crisis on which the world is evidently entering even now. The individualistic order of society is giving way before the impact of an inexorable process of socialization, and the future will depend for a long time on the course and the extent of this process. I should like to recall some remarkable pages by a German economist, who in 1890 looked on Great Britain as the land of promise for a "social peace":

"How could the inheritance which represents our highest spiritual and moral possessions and whose guardians we are, be considered entirely secure? If the movement which threatened to annihilate it, assimilates it in

[1] *Ethnologische Studien über die Entwickelung der Strafe* (1894).

such a way as (itself) to carry it towards the future; if instead of battling against existing society, it helps to develop it. But we seem farther than ever from such a solution; it demands an almost impossible amount of insight on both sides: it means that the *masses* should understand that the progress of mankind can only be gradual and peaceful, for it means indeed not the education of a few but of all, including every individual. Is it not thoroughly unscientific to advance the opinion in a century devoted to historical research and the doctrine of evolution, that an ideal state of society could be attained at one stroke, by means of external changes, and that progress means anything else than the development of what already exists? But the understanding demanded from the *upper classes* is not less hard, namely, to own that new times with new demands have now dawned and it is no longer possible to 'put new wine into old bottles.' Instead of such insight we find overbearing behaviour on the one side and suspicion and hatred on the other; the people are divided into two nations, out of contact, and without understanding for each other; they feel and think discordantly and, as Lord Beaconsfield said of his country, 'they are as much strangers to each other as if they had been born in different hemispheres'."[1]

It cannot be expected that the immense changes that are taking place in the domain of positive law should be accompanied by an easy and smooth transformation of jurisprudence. The process has, however, produced some remarkable speculations in that field, and they are distinguished in a characteristic manner as much by negative tendencies as by constructive features. Duguit's work in France occupies a prominent position in this respect.[2] He sets out as an uncompromising opponent of the juridical personality of the State, which he treats as a mere fiction, devised to conceal the matter-of-fact preponderance of

[1] G. VON SCHULTZE-GAEVERNITZ, *Zum socialen Frieden* (1890), p. viii.

[2] *Études de droit public; Droit constitutionnel; Transformation du droit privé; Transformation du droit public; Droit social.*

particular persons or groups. Instead of this "exploded" view he desires to set up the conception of social solidarity with public services and duties corresponding to it. It is not difficult to perceive that this change of attitude has been inspired by a general hostility to the State constructed on the lines of the conceptions of personality and will. It is more than doubtful, however, whether the author has succeeded in providing his nation of social solidarity with sufficiently definite attributes to enable it to act as a foundation for a system of law. We may extend or minimize the part played by the organized commonwealth in the life and conduct of its individual members, but it is difficult to see how even a socialistic commonwealth can get rid of the contrast between the personal and the public, the social and the individual. As a society organized for rule, it is bound to assume the form of a superphysical person.

Duguit's second position calls forth even stronger objections. He denies the existence of right as distinguished from law, the existence of subjective and individual claims of justice as distinct from objective rules.[1] (The subjective right, *Droit subjectif*, of Continental jurists.) He believes that men's position and activity in society are sufficiently defined by the duties imposed on them by social solidarity and points to the frequent cases when society demands the curtailment and sacrifice of the most elementary "rights"—e.g., claims to property and even to life. I will merely refer my readers to the pertinent criticism of Saleilles,[2] who, while recognizing the cleverness of Duguit's deductions, rejected them as subversive of the very essence of law. As long as society is made up of live individuals, its structure and order are bound to proceed from combinations between them, and if rights are assigned and limited by law, the latter appears, on the other hand, as a product of compromises and agreements which assume the technical shape of *rights*. The necessary renunciations and sacrifices are at bottom measures of expediency and of self-defence, and their apparent

[1] *Études de droit public*, I, ch i and ii.
[2] *Œuvre de Raymond Saleilles*, p. 32.

opposition to individual aspirations is in truth the surrender of casual licence for the sake of a reasonable assurance.

Another interesting symptom of the fermentation in the domain of jurisprudence is presented by Professor Eugen Ehrlich's book, *Elements of the Sociology of Law.* The writer seeks to show that the law administered by the courts of justice is only a small part, and the most external part, of the juridical process. The real roots of law rest in the soil of everyday intercourse, of social custom, and the greater the technical severance of legal rules from this broad social basis, the worse for society at large. All the misunderstandings, the encroachments, the pedantries of modern legal systems may be traced to this source. We are reminded of the arguments urged by von Bülow in his attack on the logical method of interpretation in German law, but the contributions of Ehrlich are stated in a much more comprehensive form, and connect themselves, in the past, with Puchta's teaching, while they point in the future to a recasting of legal rules and institutions to fit the requirements of a socialistic development. Subjective "right" has to suffer again in the process, because social needs and conventions are assigned the preponderant rôle in the forming of legal rules. Another Austrian, Professor A. Menger of the University of Vienna, has taken upon himself the task of criticising in detail the rules of the German Civil Code from a socialistic point of view, and has sketched the outlines of a socialistic legislation.[1] But his work, though very interesting, belongs rather to the field of positive law than to that of jurisprudence. There can be no doubt in any case that the socialistic movement cannot content itself with vague and sentimental attacks upon the existing legal order and the jurisprudence of the individualistic State. It is on the way to putting forward jurisprudential theories of its own.

We may like it or not, we may hail the recasting of social values or deplore it, but we have to make up our minds that

[1] ANTON MENGER, *Neue Staatslehre*, Jena, 1904. It would be out of the question to estimate in any way the possibilities arising out of the idea of a League of Nations.

the transformation is taking place as an episode of historical evolution. Let us remember the attitude of a great representative of an aristocratic civilization, Alexis de Tocqueville, before the advent of democracy. Something similar may be witnessed now in a book like Dicey's *Law and Opinion:* it sets before us in a concise and vivid contrast the elemental struggle between the individualistic tendencies, as illustrated by Bentham, and the rising tide of socialistic conceptions resulting in a crisis of English juridical thought and legislation.

From our point of view these ideas are expressive not only of the social anxieties and strivings of our time, but also of a scientific movement. Law has to be studied in constant reference to the movement of public opinion at large, because it is not only technical, but broadly historical: philosophers, naturalists, economists, students of political science, jurists, have all been thinking and talking of evolution. Its manifestations have been studied among the totem groups of Australia, the clans of the Celts, the communities of the Indians and of the Slavs, the towns of mediæval Germany. It is time that we should turn to the evolutionary crisis in which we are ourselves implicated nowadays. The ground is shifting under our feet and it is no use pretending that the province of law alone remains steady and immobile in the midst of the general transformation.

Scope of General Jurisprudence.

But is it not possible to put together a certain number of fundamental principles of jurisprudence derived from the universal requirements of the human mind, and to constitute in this way a formal[1] theory of law, independent of modifications brought about by national, geographical, political peculiarities? Such is really the claim of so-called "general jurisprudence." It may be observed at once, that such a claim seems rather odd on the part of writers who have renounced the conception of a law of nature and pin their faith to positive law. Though Wolff and Kant could map out schemes of universal jurisprudence, Austin and Holland have no right to do so. Nor does it make the

[1] HOLLAND on "Formal Theory of Law," *Jurisprudence*, p. 6.

attempt less inconsistent on the part of these latter writers, that they limit their province of jurisprudence to the law of the civilized world. What is the civilized world? When did it begin to exist? Is Christian civilization to be included in it? Is the law of the Roman jurists to be considered? Have Plato and Aristotle the right to speak on the philosophy of law? Are Mohammedan and Brahmanic conceptions to be excluded from consideration? Is it irrelevant for jurists to observe the beginnings of ideas of judicial authority, of public sanction, of private right, of family arrangements, of property, of possession, of cooperation? It would be difficult, to be sure, to embrace the whole range of human development by ideas of universal jurisprudence, but if we have to cut off arbitrarily parts of this development for the sake of unity of treatment, this surely shows that a scientific treatment of the subject ought to aim not at absolute and universal, but at relative constructions.

And when we examine modern textbooks of general jurisprudence in detail, we do find that the universal element in them is, at bottom, restricted to a statement of queries and a registration of disagreements. The setting of these queries is not accidental. All systems of law have to deal with rules and rights. All have to classify their material under the headings of public and private law. All consider delict and compensation, crime and punishment. All treat of status and contract, of things and obligations, etc. But suppose that, after drawing up your table of contents, you proceed to define law and right or property or crime? You will not only find that many of your colleagues disagree with you—this is inevitable in any case—but it will be difficult to deny that the ideas of the Greeks about justice as the end of law, or the Roman conception of absolute property (*dominium*) or the view of Canonists as to crime and sin, do not coincide with the teaching of modern jurists and are not likely to coincide with the doctrines of their probable successors.[1]

There is bound to be more substantial agreement as

[1] MERKEL, *Juristische Encyclopädie* (1885), par. 35.

regards *methods* of legal thought in so far as these rest on an application of *logic*, because formal logic is built upon universally accepted rules as to operations of reasoning. But in this department also, all the technical elements supplied by positive law as regards rules of presumption, of proof, of relevancy, of pleading, etc., will be "municipal" or relative and not universal or absolute. To sum up, the "general jurisprudence" of the nineteenth century can hardly stand for anything else than an encyclopædic survey of the juridical principles of individualistic society. In this sense it deserves full attention, because it expresses the tendency of the legal mind to co-ordinate and to harmonize its concepts into a coherent and reasonable whole on a given basis—the basis of individualism.

Legal history and historical jurisprudence.

Dogmatic or, as people generally say in England, analytical jurisprudence cannot claim to be more absolute in its tenets than the other departments of social science. It is conditioned by circumstances and therefore *historical* in its essence. But, of course, the term "circumstances" may mean different things. It may point to the ever-flowing course of actual history. In this case the most important features of the development have to be selected from the sequence of innumerable events by the legal historian. But the aim may also be to trace the life of juridical ideas in their action and reaction on conditions, and for that purpose the student of *historical jurisprudence* has to group his material in accordance with the divisions and relations of ideas rather than with dates. In other words, the order followed by legal history is chronological; that followed by historical jurisprudence is ideological. The significance of human evolution consists in the fact that such ideal lines can be traced in its progress: the saying, *vis consilii expers mole ruit sua*, does not apply to it.

The problem set to scientific method is how to utilize that characteristic feature of human evolution. Certain indications in this respect may be gathered from recent attempts in the study of political economy, which, as I have already had occasion to remark, stands for obvious reasons in the forefront of social research. After passing through the

stages of abstract deduction and of vague historical synthesis, it has entered at present into a stage of intensive co-operation between the two.

Interesting suggestions have been made which have a wider bearing than the solution of purely economic problems. For instance, in a series of articles on the historical school in economics, as founded by Roscher and Knies, Max Weber pleads for a study of *types* of economic development.[1]

As an illustration of the manner in which the methodical principle of what may be called an ideological study of types may be applied, we may refer to K. Bücher's contributions towards a theory of economic stages.[2]

The use of the *ideological* method undoubtedly presents great difficulties and dangers: it is especially open to attack on the part of professional historians accustomed to the critical study of sources and to the ranging of facts within exact limits of time and place. Bücher's generalizations have, as a matter of fact, called forth very sharp objections from a leading historian, Edward Meyer.[3]

But this seems to be a case when *du choc des opinions jaillit la vérité.* If the besetting dangers are realized, it is not impossible to steer clear of them, and in any case, even if some of the diagrammatic simplifications may have to be materially supplemented, their sharply cut formulæ will have served a useful purpose by concentrating thought and starting it on fresh tracks. Quite apart from methodological speculation, we can point to a certain number of works that have played such a part in the literature of social science. Fustel de Coulanges' *Cité Antique* may be cited as a case in point. The deduction of all the details of civic life from ancestor worship is a palpable exaggeration of one aspect of ancient culture: it leads to a distorted perspective of the interplay of social functions. And yet there is hardly a book among the innumerable

[1] *Roscher und Knies* (SCHMOLLER'S *Jahrbücher für Gesetzgebung, Verwaltung und Volkswirtschaft im deutschen Reich*, xxviii [1903]).

[2] *Entwickelung der Volkswirtschaft*, pp. 102, 103.

[3] *Kleine Schriften zur Geschichtstheorie und zur wirtschaftlichen und politischen Geschichte des Altertums* (1910).

works on classical antiquities that brings home in such a powerful manner the typical grouping of the classical household and its bearing on social arrangements.

On a more extensive scale the same estimate may be applied to Mommsen's grand construction of Roman constitutional law around the idea of the *imperium:* it is also too forcible a simplification of a very complicated set of facts, but who can deny that the energetic elaboration of the dominant idea has illumined a maze of details with a directive light?

Stages and types of juridical evolution.

How are we to apply these methodological considerations to a systematic treatment of historical jurisprudence? It seems to me that the clue is to be found in the very attempts to build up a *general* jurisprudence for civilized mankind. Such attempts have turned out to be in truth constructions of a *typical* jurisprudence on *individualistic* lines. Taken in this sense they are justified and worthy of careful attention. They represent a concentration of the leading juridical principles in various departments of law round a central conception derived from the nature of the social tie—that of co-ordination of individual wills. Recent discussions make it abundantly clear that if individualistic civilization were to give way before one based on a *socialistic* conception of the social tie, all the positions of jurisprudence would have to be reconsidered. Nor is it doubtful that our individualistic jurisprudence has established its predominance after a prolonged struggle with *feudal* and *theocratic* conceptions derived from the social ties of human fidelity and of Divine guidance. Looking still further back, we may discern a great period of civilization in which the type of jurisprudence was settled by the social tie of *city* life. Previously to the antique πόλις, we have the records of *tribal* arrangements: they did not result in philosophical abstractions, but their unity and dialectical consequences can be sufficiently established in all directions.[1] And let us note that even a more primitive typical concentration of *totemistic* society has been discovered by

1 *Essays in Legal History*, ed. by P. Vinogradoff, p. 10.

anthropological science, and has to a certain extent been subjected to a systematic treatment as a social type,[1] though, naturally, there is not much technical law at that stage. It might be tempting to tabulate the typical constructions of historical jurisprudence in the following manner:

1. Origins in Totemistic Society.
2. Tribal Law.
3. Civic Law.
4. Mediæval Law in its combination as Canon and Feudal Law.
5. Individualistic jurisprudence.
6. Beginnings of socialistic jurisprudence.

Such a scheme does not attempt to cover the whole ground. It leaves aside important variations, such as the juridical systems of Brahmanism, of Islam, of the Talmud. It is restricted in the main to the evolution of juridical ideas within the circle of European civilization. Yet in tracing earlier stages it is bound to take into account materials collected by anthropological inquiries from a wider range, in fact from all inhabited parts of the world. Only by this means can the complicated problems of early society be approached with any hope of solution. As the treatment is bound to be *ideological* and not *chronological,* the very important facts of Roman Law will have to be considered under various points of view—they help us to understand not only the civic state of the republican period, but also the archaic rules of Tribal law on the one hand, and the individualistic jurisprudence of the Empire on the other. This subject has received so much attention from the point of view both of legal history and of dogmatic study, that it is not difficult to arrange it on the lines of historical jurisprudence. A more difficult problem is presented by Mediæval Law. It might be theoretically correct to oppose as extreme contrasts feudal jurisprudence, based ultimately on the economy of the manor, and the world-wide expansion claimed for Divine guidance of

[1] For example, by DURKHEIM, *Elementary forms of religious life.*

Canon Law. The sources of the two systems are undoubtedly distinct and to a great extent antagonistic. But it is not a mere accident that the two laws—the feudal and the Canon—are found growing on the same soil. Their dualism is the necessary consequence of their extreme one-sidedness. Feudal law has too narrow and Canon too wide a basis: one starts from the estate and the other from mankind. Even technically the one cannot exist without being supplemented by the other. Feudal law has not attempted to develop a theory of justice, of equity, of crime. On the other hand, the Church has not worked out a system of land law or of status. In certain fields—like family law, succession, contract, corporation,—the two influences meet in conflict and in compromise. It would be impossible to do justice to this important period of juridical thought and activity by separating these divergent elements of the real world or by trying to effect a complete construction of the juridical system on the strength of either one or the other taken by itself. There is nothing left but to treat of them in conjunction.

Difficulties of ideological treatment.

So much as an explanation of my scheme. In conclusion I should like to submit two considerations which have to be borne in mind by any one who wishes to follow an attempt to sketch a historical jurisprudence on the above-mentioned lines. When we treat of facts and doctrines in *ideological* order we do not mean for a moment to deny or to disregard the conditions—geographical, ethnological, political, cultural—which have determined the actual course of events. Ideas do not entirely get their own way in real life; they are embodied in facts, and these latter appear influenced largely by material necessities and forces. It is not without importance for the development of legal principles whether the atmosphere surrounding them is that of a pastoral, an agricultural, or an industrial community; it is certainly of importance for public and private law whether a nation is living an independent life or has had to submit to conquest, etc. In a word, the chronological process of history cannot fail to affect the ideological deductions from a social type. We are bound, therefore, to make due allowance for

the various cross-currents produced by actual conditions.

The second consideration is equally obvious, but perhaps even more difficult to put into practice. In constructing a typical theory of jurisprudence we are bound to present rules and institutions in a state of logical coherence and harmony, to establish a certain equilibrium between conflicting tendencies, to apportion rival claims as normal or exceptional, in a word, to consider jurisprudence from a *static* point of view. But then there is the *dynamic* one; ideas are mobile entities, passing through various stages—indistinct beginnings, gradual differentiation, struggles and compromises, growth and decay. It is not easy to do justice equally to both aspects of the process, and each individual worker will necessarily pay more attention to one or to the other. But we need not feel concerned about the ultimate outcome of such more or less inevitable limitations: the necessary corrections and synthesis are sure to be achieved by workers coming from different sides and converging towards a common aim.

The essential point is to recognize the value of *historical types* as the foundation of a theory of law.

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